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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 551

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a Foreign Corporation,
Petitioner,
vs.
EUGENE LUDWIG, as Guardian of the Estate of
Richard Paul Zatek, a minor, Cause No. 21997;
TERESA SERRATONI, as Administratrix of the Estate of
Joan Ellen Zatek, Deceased, Cause No. 21998;
TERESA SERRATONI, as Administratrix of the Estate of
John Michael Zatek, Deceased, Cause No. 21999;
JOHN ZATEK and WOLVERINE INSURANCE CO.,
a Michigan Corporation, as Subrogee of
John Zatek, Cause No. 22025,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Figures (a) and (b) refer to pages of Petitioner's Appendix and Respondents' Appendix, respectively, used in the Court below, nine copies of which are filed herewith.)

At the outset your Petitioner, The Chesapeake and Ohio Railway Company, wants to call this Court's atten-

tion to the fact that due to the manner in which these cases have reached this stage of litigation, Petitioner has not been required nor has it had an opportunity to present its Motion For New Trial to the United States District Court, which Motion would include multiple grounds which Petitioner asserts would entitle it to a new trial irrespective of the questions of law herein presented. Nevertheless, Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled cause on June 23, 1964, which judgment was made final by a denial of Petitioner's timely Petition For Rehearing on August 21, 1964, in order to protect the record so that it cannot be asserted in any subsequent proceedings that Petitioner waived its rights to raise the questions herein presented.

OPINIONS BELOW

The Opinion of the United States District Court is printed as Appendix A, *infra*, and is reported at 229 F. Supp. 61. The Opinion of the Court of Appeals is printed as Appendix B, *infra*, and is reported at 333 F. 2d 621. The Opinion of the Court of Appeals on Petitioner's Petition For Rehearing is printed as Appendix C, *infra*, and is not yet reported.

JURISDICTION

Judgment of the Court of Appeals was entered on June 23, 1964 (Appendix B), *infra*, page 61, and the Judgment of the Court of Appeals on Rehearing was entered on Aug-

ust 21, 1964 (Appendix C), *infra,* page 75, vacating judgments entered in behalf of Petitioner in these cases and remanding the case for entry of judgments in favor of Respondents in accordance with the jury verdicts. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are pertinent:

Fifth Amendment to the Constitution of the United States, set forth in Appendix E, *infra.*

Seventh Amendment to the Constitution of the United States, set forth in Appendix G, *infra.*

Fourteenth Amendment to the Constitution of the United States, set forth in Appendix F, *infra.*

28 U.S.C.A. §1254(1), set forth in Appendix D, *infra.*

28 U.S.C.A. §1652, set forth in Appendix H, *infra.*

Compiled Laws of Michigan 1948, §462.44 (Mich. Stat. Ann. 12.62), set forth in Appendix I, *infra.*

QUESTIONS PRESENTED

1. May the Court of Appeals vacate judgments in favor of Petitioner and reinstate verdicts for Respondents when the only evidentiary support for such verdicts are material facts judicially noticed for the first time by the Court of Appeals after the case was submitted without a request by any party and the facts noticed are patently disputable and contrary to the pleadings and proofs in the court below?

2. Was Petitioner deprived of one of the elements of due process of law guaranteed by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States when the Court of Appeals took judicial notice of the truth of certain disputable material facts essential to its decision at the appellate level after the case had been submitted and without the request of any party?

3. Was Petitioner deprived of its right to a trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States when the Court of Appeals, after the case was submitted, *sua sponte*, supplied certain material facts necessary to its decision by way of judicial notice?

4. Where jurisdiction of the Federal Court is based solely upon diversity of citizenship in a negligence action arising out of an accident occurring in the State of Michigan and the proofs are legally insufficient under Michigan law to support a judgment in the District Court on the theory pleaded by Respondents, is it error for the Court of Appeals to supply material facts, by way of judicial notice, to support an opposite theory of recovery and thereafter hold the proofs are sufficient to support verdicts for Respondents.

5. Where jurisdiction of the Federal Court is based solely upon diversity of citizenship, is it error for the Court of Appeals to reinstate jury verdicts based upon ultimate facts derived by speculation and conjecture and the pyramiding of inference upon inference and presumption upon presumption.

6. Where jurisdiction of the Federal Court is based solely upon diversity of citizenship in a negligence action arising out of an accident occurring in the State of Michigan, and under the circumstances, the law of the State

of Michigan clearly holds that an alleged failure to maintain a proper lookout is not a proximate cause of the accident, is it error for the Court of Appeals to refuse to apply the substantive law of the State and substitute its own rule of proximate cause?

7. Where jurisdiction of the Federal Court is based solely upon diversity of citizenship in a negligence action arising out of an accident occurring in the State of Michigan and no state court, statute, ordinance, rule or regulation has placed a duty upon Petitioner to alter the speed of its trains in the area where the accident occurred, is it error for the Court of Appeals to permit a jury to establish such a legal duty?

STATEMENT OF THE CASE

The accident out of which this litigation arose occurred on the clear, sunny afternoon of June 16, 1961, at about 4:30 p.m., when a secondhand 1958 Chevrolet Station Wagon, owned by John Zatek and being operated in a southerly direction on Middlebelt Road in the City of Livonia, Michigan, by his wife, Lois Jane Zatek, stalled upon Petitioner's railroad tracks and was struck by one of its eastbound freight trains. It was undisputed that Lois Zatek, the driver of the automobile, was a new and inexperienced driver unfamiliar with the operation of the automobile as to its mechanical aspects. She had been driving the automobile only about two weeks before the accident occurred, and at the time of the accident was still operating the automobile on a temporary operator's permit.

The automobile was also occupied by Joan Ellen Zatek, age 6, John Michael Zatek, age 3, and Richard Paul Zatek,

age 2, all of whom were children of John and Lois Zatek. As a result of the accident the driver, Lois Zatek, and her children, Joan Ellen Zatek and John Michael Zatek, were instantly killed, while Richard Paul Zatek suffered a broken leg and concussion from which he recovered completely, but at the time of trial he suffered gross stress reaction as a result of the loss of his mother.

Separate actions were brought in behalf of all the occupants of the automobile, and also by the father, John Zatek, and progressed in the United States District Court for the Eastern District of Michigan, Southern Division, jurisdiction of that court being invoked because of diversity of citizenship of the parties. The five actions were consolidated for trial and assigned to the Honorable Ralph M. Freeman, United States District Judge.

In their Complaints, Respondents alleged multiple grounds of negligence on the part of Petitioner, and alleged that the automobile was stalled (9a), helplessly disabled (11a), and in a position of inextricable peril (13a) on Petitioner's tracks at the time the train was approaching. At the close of the proofs Respondents abandoned any claim that the crossing was extra hazardous (63b, 66b, 93b); abandoned any claim that the crossing protection was not properly operating or that other or different type of protection should have been installed (161a, 162a, 91b, 93b); abandoned any claim that the warning signals of the approaching train were not properly sounded (161a, 172a, 91b, 93b); and abandoned any theory of recovery under the Doctrine of Last Clear Chance because it had been repeatedly admitted by Respondents that when the automobile stalled on the crossing the train was then too close to be able to avoid the accident (2b, 3b, 65b, 66b, 91b).

The crossing where the accident took place consists of five (5) tracks of Petitioner's railroad and a four-lane concrete road, known as Middlebelt Road, which crossed at approximately right angles, and both the railroad tracks and Middlebelt Road were straight and approximately level for a distance of several thousand feet on each side of the crossing. The railroad crossing was protected by the maximum type of protection available at railroad grade crossings (20b, 30b, 31b) consisting of back-to-back standard railroad flasherlight signals and bells and short arm gates, so constructed and operated pursuant to the approved plans of the Michigan Public Service Commission so as to provide twenty (20) seconds minimum warning for the fastest trains operated over the crossing. The device which actuated the crossing protection was located 3018 feet west of the crossing and was so arranged that the flashing lights and bells commenced operating one to two seconds after the approaching train reached the actuating device (61a) and operated for five (5) seconds before the short arm gates commenced their descent (60a, 61a). Eleven (11) seconds were required for the short arm gates to move from the vertical to their full horizontal position (60a, 61a). The timing sequence above referred to was in accordance with the regulations of the Michigan Public Service Commission (89b).

No statute of the State of Michigan or ordinance of the City of Livonia in any way restricted the speed of Petitioner's trains over the crossing in question. The Michigan Public Service Commission, to whom the State Legislature had delegated police powers over the railroads in Michigan and which had acquired and maintained jurisdiction over the crossing in question (30b) had not limited the speed of Petitioner's trains over the crossing, although it was aware of the fact that Petitioner operated trains at speeds up to 78 miles per hour over the crossing. The In-

terstate Commerce Commission had issued no regulations with respect to the speed of Petitioner's trains over this crossing. It was Respondents' position in the United States District Court that the Michigan Public Service Commission or the Interstate Commerce Commission had exclusive jurisdiction with respect to the setting of speed limits over this crossing (98b, 99b, 100b).

The Zatek automobile was first observed approaching Petitioner's tracks when it was in the near vicinity of the flasher signal located in the northwest quadrant of the crossing. At that time it was moving at a slow or creeping rate of speed and passed underneath the descending gates and onto the tracks where it stalled on the middle track of the crossing, upon which track Petitioner's eastbound freight train was approaching at a speed of approximately 60 miles per hour.

As Petitioner's train, consisting of 79 cars, one caboose and three diesel locomotives, weighing approximately 4136 tons, was approaching the crossing it properly sounded all of the warning signals required, and the flashing lights and bells and the short arm gates were operating properly. Petitioner's railroad engineer first observed the automobile stalled on the crossing when the train was in the vicinity of the whistle post, approximately 1350 feet west of the crossing (28a). The brakes of the train were applied in emergency when the train was approximately 1200 feet west of the crossing (28a), and the train came to a stop at a point approximately one-half mile east of the crossing.

It was Respondents' position, repeatedly asserted throughout the trial, that by mathematical computations based upon facts most favorable to them, the automobile stalled on Petitioner's tracks when the train was 2380 feet west of the crossing, at which time it was alleged that the

brakes should have been applied (34b, 35b, 53b, 54b, 122a, 64b, 65b, 89b, 90b, 91b, 92b, 93b). There was never any question, throughout the trial of these cases, but what Petitioner's train could not have been stopped in time to avoid the accident after Respondents' automobile first stalled on the track (2b, 3b, 65b, 66b, 91b). The undisputed proofs showed that if the brakes of Petitioner's train had been applied at a point 2380 feet west of the crossing where Respondents claim that the lead engine of Petitioner's train was at the time Respondents' automobile stalled, Petitioner's train would h struck Respondent.' automobile at a speed of 40 miles per hour (53b, 54b, 122a). The undisputed proofs also showed that if the brakes on Petitioner's train had been applied where Petitioner's railroad engineer claimed to have applied them, the train would have struck the automobile at a speed of approximately 55 miles per hour (123a). There was a complete absence of proof that the results of the accident would have been different if the collision had occurred at a speed of 40 miles per hour rather than 55 miles per hour or any intervening speed.

The case was submitted to the jury upon the following two grounds:

1. Did defendant railroad operate its train at an excessive speed?

2. Did the engine crew, for whose acts the defendant is responsible, fail to keep a proper and adequate lookout for traffic on Middlebelt Road?

After the jury had been instructed by the District Court the parties hereto agreed that the brakes of Petitioner's train were applied in emergency either at a point 1200 feet west of the crossing, as claimed by Petitioner's railroad engineer, or at a point 954 feet west of the crossing, as

calculated by Respondents' expert witness, and the jury was further instructed to that effect (95b, 96b).

After due deliberation, the jury returned a verdict of no cause of action in the case brought in behalf of the driver of the automobile, and returned verdicts aggregating $56,000.00 against Petitioner in the remaining four cases brought in behalf of the passengers and the owner of the automobile.

Petitioner timely filed motions to set aside the verdicts in the instant cases, which were granted by the United States District Court, and judgments in favor of Petitioner were duly entered. Respondents' motion for new trial in the case brought in behalf of the driver of the automobile was denied. Thereafter Respondents appealed from the judgments entered in favor of Petitioner in all five cases.

The cases were duly argued before the United States Court of Appeals for the Sixth Circuit, and its opinion affirming the District Court in entering judgment in favor of Petitioner in the driver's case and reinstating the jury verdicts in the present cases was filed on June 23, 1964. Petitioner timely filed its petition for rehearing, which was denied on August 21, 1964. Thereafter Petitioner filed its motion for stay of issuance of mandate in the present cases, pending its filing of this Petition.

REASONS FOR GRANTING THE WRIT

1. In taking judicial notice of certain material facts essential to support its decision, which facts are contrary to the theory of facts alleged in the pleadings and which facts are patently disputable, the Court of Appeals has decided a Federal question of evidence contrary to the decisions of this Court.

2. In taking judicial notice of certain disputable material facts essential to its decision at the appellate level after the case has been submitted and without the request of any party at any stage of the litigation, the Court of Appeals has deprived Petitioner of an element of due process of law guaranteed by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States by precluding Petitioner from being apprised of the theory of negligence upon which recovery was allowed and denying Petitioner the right to offer proof to contest the truth of the facts judicially noticed.

3. In taking judicial notice of certain disputable material facts essential to its decision at the appellate level after the case has been submitted and without the request of any party at any stage of the litigation, the Court of Appeals has deprived Petitioner of its right to have issues of fact tried before a jury as guaranteed by the Seventh Amendment to the Constitution of the United States by precluding the jury from determining the facts from all the evidence and denying the jury the opportunity to draw legitimate inferences from the facts thus determined.

4. Where jurisdiction of the Federal court is based solely upon diversity of citizenship and the proofs are legally insufficient under Michigan law to support a judgment in the District Court on the theory pleaded, in taking judicial notice of certain disputable material facts to support a theory of recovery opposite to the theory alleged in the pleadings, and, based upon the facts judicially noticed, reverse judgments for Petitioner in the District Court, which judgments were bottomed on a lack of any evidence to support the verdicts, and hold that the evidence was sufficient to support the verdicts, the Court of Appeals has decided a federal question of pleading and evidence contrary to the decisions of this Court and in conflict with the

decisions of the Courts of Appeals in other circuits. In addition, this opinion of the Court of Appeals holds that the sufficiency of evidence to support a verdict is a matter of Federal law rather than State law, which is a question upon which the Courts of Appeals are not in agreement and which has not been decided by this Court heretofore.

5. Where the jurisdiction of the Federal Court is based solely upon diversity of citizenship in a negligence action arising out of an accident occurring in the State of Michigan, and where there is a complete absence of probative evidence from which a jury could determine ultimate facts essential to a verdict without resorting to guess, speculation and conjecture and the heaping of inference upon inference and presumption upon presumption, the Court of Appeals should not be permitted to reach the same ultimate facts in the same manner but under the guise of judicial notice when both this Court and the Supreme Court of Michigan have held that ultimate facts may not be established in such a manner.

6. Where the jurisdiction of the Federal Court is based solely upon diversity of citizenship in a negligence action arising out of an accident occurring in the State of Michigan, the failure of the Court of Appeals to apply the clearly applicable substantive rule of law of proximate cause, as set forth by the Supreme Court of Michigan, and the substitution of its own rule of proximate cause is contrary to the long established decisions of this Court in such actions.

7. Where the jurisdiction of the Federal Court is based solely upon diversity of citizenship in a negligence action arising out of an accident occurring in the State of Michigan, the Court of Appeals should not be permitted to allow a jury to establish a legal duty on Petitioner to alter the speed of its trains where no duty existed theretofore.

ARGUMENT

1. **May the Court of Appeals vacate judgments in favor of Petitioner and reinstate verdicts for Respondents when the only evidentiary support for such verdicts are material facts judicially noticed for the first time by the Court of Appeals after the case was submitted without a request by any party and the facts noticed are patently disputable and contrary to the pleadings and proofs in the court below?**

2. **Was Petitioner deprived of one of the elements of due process of law guaranteed by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States when the Court of Appeals took judicial notice of the truth of certain disputable material facts essential to its decision at the appellate level after the case had been submitted and without the request of any party?**

3. **Was Petitioner deprived of its right to a trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States when the Court of Appeals, after the case was submitted, sua sponte, supplied certain material facts necessary to its decision by way of judicial notice?**

4. **Where jurisdiction of the Federal Court is based solely upon diversity of citizenship in a negligence action arising out of an accident occurring in the State of Michigan and the proofs are legally insufficient under Michigan law to support a judgment in the District Court on the theory pleaded by Respondents, is it error for the Court of Appeals to supply material facts, by way of judicial notice, to support an opposite theory of recovery and thereafter hold the proofs are sufficient to support verdicts for Respondents?**

Although the above four questions raise separate issues of law they are consolidated for argument since these

questions arose out of the action of the Court of Appeals in taking judicial notice of certain disputable material facts to support a theory of recovery opposite to the theory alleged in the pleadings, and in conformity with a theory of recovery specifically abandoned by Respondents after the case had been submitted and without any party requesting the District Court or the Court of Appeals to take judicial notice of those facts at any stage in the litigation.

The Amended Complaints filed in these cases alleged that Respondents' automobile was stalled (9a), helplessly disabled (11a), and in a position of inextricable peril (13a) on Petitioner's tracks at the time the train was approaching. It was further alleged that Respondents' driver, Mrs. Zatek, was unfamiliar with the operations of a motor vehicle, as to its mechanical aspects (8a). The undisputed proofs showed that she was a new and inexperienced driver, having driven the automobile only about two weeks before the accident occurred (55b), and was still operating on a temporary driver's permit (57b). It was not disputed that the automobile was a secondhand three year old Chevrolet Station Wagon.

Although Respondents introduced proofs on what could cause an automobile to stall (127a, 128a), there were no proofs on what caused Respondents' automobile to stall, and there was a complete absence of proof that Respondents' automobile could ever have been started and moved from its stalled position regardless of any additional time which may have been afforded. In short, Respondents' automobile was in a position of inextricable peril, as Respondents alleged in their pleadings (13a). The District Court recognized the lack of proof on this point by stating in its Opinion (188a):

> "In the instant case there is no testimony to indicate that Mrs. Zatek would have been able to start her car should additional time have elapsed before the train reached the crossing."

The theory of Respondents' case as tried in the District Court was that Respondents' automobile was helplessly stalled upon Petitioner's railroad tracks, a position from which it could not be extricated, and Petitioner's train crew was under a duty to have recognized Respondents' peril at the moment the automobile stalled on the tracks and thereafter should have immediately applied the brakes on the train because, as Respondents say (93b):

> "Cars don't just stop in front of a train. They ought to know something is wrong when a car is stopped."

After the proofs were closed, Respondents admitted that the train could not have been stopped in time to have avoided the accident (65b, 66b) and withdrew their claim of recovery under the Last Clear Chance Doctrine (65b).

It was repeatedly asserted by Respondents, throughout the trial, that under the evidence most favorable to them, the automobile stalled on the tracks when the lead engine of Petitioner's train was 2380 feet west of the crossing, at which time the brakes of the train should have been applied (34b, 35b, 53b, 54b, 122a, 64b, 65b, 89b, 90b, 91b, 92b, 93b). The undisputed proof of Respondents' expert showed that if the brakes had been applied 2380 feet from the crossing the train would have struck the automobile at a speed of approximately 40 miles per hour (122a, 53b, 54b). According to Respondents' expert, the automobile would have been struck at a speed of approximately 35 miles per hour if the train brakes were applied approxi-

mately 1200 feet west of the crossing as stated by Petitioner's diesel engineer (123a). The jury was instructed that the brakes on Petitioner's train were applied either 1200 feet west of the crossing as stated by Petitioner's diesel engineer, or at a point 954 feet west of the crossing as calculated by Respondents' expert witness (95b, 96b).

After alleging, in the District Court, that Respondent's automobile was helplessly stalled and in a position of peril from which it could not be extricated, and without introducing any proof on these points, Respondents' argued, in the Court of Appeals, that if given additional time Respondents' driver may have been able to start the automobile and move off the tracks. After admitting in the District Court that the accident could not have been avoided, and after introducing uncontradicted testimony in the District Court that Petitioner's train could not have been stopped in order to avoid the accident within the distance afforded after Respondents' car stalled on the track, Respondents argued, in the Court of Appeals, that Petitioner's train may have slowed down in time to have avoided the accident.

In reversing judgments for Petitioner and, in reinstating verdicts for Respondents in this case, the Court of Appeals was required to supplement the record by taking judicial notice of certain material facts in order to support a theory of recovery opposite to the theory alleged by Respondents in their pleadings, and in conformity with a theory of recovery specifically abandoned by Respondents. The pertinent portion of the Opinion of the Court of Appeals with respect to this judicial notice reads as follows.

> "We take judicial notice of the fact that a modern automobile can be started and moved its own length in very few seconds. We also note that any movement of the automobile and any decrease of speed or force of the train--even if insufficient to have

> prevented impact—could have changed substantially both the nature of the accident and the nature of the injuries suffered therefrom."

In taking the judicial notice quoted above, the Court of Appeals patently acknowledged a complete lack of evidence that Respondents' automobile could have been started and moved in a very few seconds; a complete lack of evidence that if the train had slowed somewhat and the automobile had been moved somewhat the nature of the accident could have been substantially changed; and a complete lack of evidence that the nature of the injuries resulting from the accident could have in any way changed. Judicial notice was only taken because there was a complete absence of evidence from which the facts could otherwise be determined. Judicial notice is merely a substitute for the conventional method of taking evidence to establish facts, *Grand Opera Co. v. Twentieth Century-Fox Film Corp.*, 235 Fed. 2d 303 (CA-7). It should not be used to supplement a record which is otherwise legally deficient of evidence to support a verdict when the very issue before the Court of Appeals is whether or not the record in the District Court is legally deficient of probative evidence to support a jury verdict.

(The numbered paragraphs below correspond to the Questions Presented for argument in this portion of the Petition)

1. Taking judicial notice that a modern automobile can be started and moved its own length in a very few seconds was error. The facts noticed are based upon two assumptions which, in themselves, are unsupported by the record and contrary to the pleadings and the proofs. To judicially notice such a set of facts it must be assumed, (1) that the modern automobile is mechanically capable of being started and moved under its own power, its own

length, in a very few seconds and, (2) that the driver is sufficiently proficient in operating the automobile to accomplish this end. In the instant case both assumptions are unwarranted. The pleadings and proof showed we are dealing with a three old secondhand automobile which was "helplessly stalled" and in a place of "inextricable peril" on Petitioner's tracks, and which was being operated by a new and inexperienced driver who was unfamiliar with the mechanical aspects of the automobile.

In judicially noting that *any* movement of the automobile and *any* decrease in the speed or force of the train could have changed substantially both the nature of the accident and the nature of the injuries suffered therefrom is also patently disputable. It certainly cannot be judicially noticed as a fact "well established" and "authoritatively settled" that the injuries resulting from the accident would have been less severe if the train had been going somewhat slower and struck the automobile in some other manner. If any assertion of fact can be made pertaining to this subject which is notorious, of common knowledge, and well established, it is that the nature and extent of injuries resulting from any accident are almost incapable of prediction. A mere perusal of the daily newspapers will reveal accidents, minor in nature, which result in fatal injuries, while other accidents, involving great force, have resulted in only minor injuries. The variables are so multitudinous that if the prediction of injuries is capable of proof at all, it most certainly requires the testimony of a well trained expert.

That the doctrine of judicial notice is a well entrenched part of our judicial system is not controverted. The doctrine is based upon obvious reason of convenience and expediency and operates to save trouble, expense, and time

which would be lost in establishing, in the ordinary way, facts which do not admit of contradiction. It is stated in *20 Am. Jur., Evidence*, §9, at page 50:

> "In order that a matter may properly be a subject of judicial notice, it must be 'known'—that is, well established and authoritatively settled. It is clear that uncertainty or difference of belief in respect to the matter in question, will operate to preclude judicial notice thereof. Matters of which the court will take notice are necessarily uniform or fixed and do not depend upon uncertain testimony, for as soon as a matter becomes disputable, it ceases to fall under the head of common knowledge and so will not be judicially recognized. The test is whether sufficient notoriety attaches to the fact involved, so as to make it safe and proper to assume its existence without proof."

With respect to the propriety of a court taking judicial notice of any fact situation, the general rule is well stated in *31 C.J.S., Evidence*, §9, at page 828, as follows:

> "The test has been said to be:
>
> (1) • • •
>
> (2) Is it certain and indisputable?"

And again on page 828, footnote 88:

> "It is not permissible for the court to take judicial knowledge of a fact which may be disputed by competent evidence."

And again on page 828, footnote 85.5:

> "A high degree of probability of the truth of a particular proposition cannot justify a tribunal in taking judicial notice of its truth."

The facts of which the Court of Appeals took judicial notice are so patently disputable that they cannot be considered well established facts which are authoritatively settled. The reasonable doubts which obviously arise from the facts noticed in the instant case should have been resolved promptly against taking judicial notice, in accordance with this Court's decision in *Brown, et al. v. Piper,* 91 U.S. 37, wherein the Court said, at pages 42, 43:

> "This power is to be exercised by the courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."

Brown, et al. v. Piper, supra, was followed in *Alvery v. United States,* 302 Fed. 2d 790 (CA-2, 1962), wherein the court said, at page 794:

> "On fact questions the Court should not use the doctrine of judicial notice to go outside the record unless the facts are matters of common knowledge or capable of *certain verification.*" (Emphasis supplied.)

Therefore, in taking judicial notice in the instant case, the Court of Appeals for the Sixth Circuit decided a federal question of evidence contrary to the decisions of this Court and also the decisions of the Court of Appeals for the Second Circuit.

Quite apart from the matters set forth above, if we assume, *arguendo,* the facts were of a type which could properly be judicially noticed, in taking such notice in the instant case at the appellate level, without a request therefore being made by any party, the Court of Appeals has decided a federal question of evidence contrary to the decision of this Court in *Quong Wing v. Kirkendall,* 223 U.S.

59. In that case Mr. Justice Holmes, speaking for the Court, said, at pages 63, 64:

> "It may or may not be that if the facts were called to our attention in a proper way the objection would prove to be real. But even if when called to our attention the facts should be taken notice of judicially, whether because they are only the premise for a general proposition of law, *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 227, *South Ottawa v. Perkins*, 94 U.S. 260, *Tefair v. Stead*, 2 Cranch, 407, 418, or for any other reason, still there are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account. Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. Therefore without prejudice to the question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned the judgment must be affirmed."

The taking of judicial notice under such circumstances is also contrary to the general rule of law, as well stated in *113 A.L.R.* 258, at 260:

> "With respect to facts, as distinguished from laws, the weight of authority supports the view that judicial notice will not be taken on appeal of a fact within the judicial knowledge of the court, which was not called to the attention of the trial court and was not judicially noticed by it. See the note in Ann. Cas. 1914B, 196; 1 Jones, Ev., 2d ed., §474. And see 15 R.C.L., Judicial Notice, §6.
>
> "'The explanation is that facts susceptible of notice are nevertheless matters of evidence and an appellate tribunal can only review evidence con-

> sidered by the court below.' 1 Jones, Ev., 2d ed., §474."

Taking judicial notice by the Court of Appeals without the request of the parties was improper under the decision of this Court in *Quong Wing v. Kirkendall, supra,* and improper under the general rule of law, 113 A.L.R. 258, and should not be condoned by this Court.

2. In taking judicial notice of certain material facts at the appellate level after the case had been submitted and without the request of any party, the Court of Appeals deprived Petitioner of one of the elements of due processes of law guaranteed by the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States since such action deprived Petitioner of an opportunity to be apprised of the theory of recovery considered by the Court, and deprived Petitioner of an opportunity to present proofs to disprove the facts noticed. It has long been held that judicial notice may relieve one party of the necessity of presenting evidence to prove a given fact, but judicial notice may not be used in such a manner as to deprive the other party of its right to dispute the matters noticed. This is especially true when facts are judicially noticed at the appellate level. In *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio,* 301 U.S. 292, the Supreme Court laid the ground rules where it said, at pages 301 and 302:

> "* * * Moreover, notice, even when taken has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, Evidence, §2567; 1 Greenleaf, Evidence, 16th ed., p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' Ibid. Cf. *Shapleigh v. Mier,* 299 U.S. 468. Such at

least is the general rule, to be adhered to in the absence of exceptional conditions."

* * * * *

"* * * Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial."

In a more recent case the Supreme Court again had an opportunity to speak out on the same subject. *Garner v. Louisiana*, 368 U.S. 157. In that case the Supreme Court of the United States overturned convictions of the defendants, although it was argued by the State of Louisiana that the trial court apparently took judicial notice of certain facts upon which it based the convictions. In discussing that issue this Court said, at page 173:

"* * * There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial.' *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 302. Furthermore, unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon."

In the instant case it is obvious that Petitioner has been deprived of an opportunity to dispute the notoriety or

truth of the facts judicially noticed since these matters first came to light in the opinion of the Court of Appeals, and the theory upon which recovery was allowed was not alleged in the pleadings nor was it supported by any evidence in the record. Under the circumstances, the Court of Appeals decided a federal question of evidence contrary to the decisions of this Court, and in such a manner as to deprive Petitioner of due process of law under the decisions in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, supra,* and *Garner v. Louisiana, supra.*

3. In taking judicial notice of certain disputable material facts essential to its decision the Court of Appeals deprived Petitioner of its fundamental right under the Seventh Amendment to the Constitution of the United States to have the jury determine issues of fact from all the evidence and to draw legitimate inferences from the facts thus established.

At the outset it must be noted that there was a complete absence of facts from which a jury could determine that the alleged failure of Petitioner's engine crew to keep a proper and adequate lookout was a proximate cause of the accident. In the Amended Complaints Respondents alleged the automobile was stalled (9a), helplessly disabled (11a) and in a position of inextricable peril (13a) on Petitioner's tracks at the time the train was approaching and that Petitioner was negligent in failing to avoid the accident when it was able to do so (10a). With respect to the first allegation, no proofs were presented and, therefore, the jury could not have found for or against the proposition. With respect to the second allegation, Respondents repeatedly admitted during trial and the undisputed proofs showed that the train could not possibly have been stopped in the distance afforded after Respondents' automobile stalled on the crossing (65b, 66b).

To enable it to set aside judgments for Petitioner and to reinstate verdicts for Respondents, the Court of Appeals, by means of judicial notice, added certain material facts to the record before it. Upon the expanded record thus made the Court concluded that a jury question was presented. Specifically, the Court of Appeals took judicial notice that a modern automobile could be started and moved its own length in a very few seconds and thereafter concluded by way of inference that Respondents' automobile could have been started and moved its own length in a very few seconds, contrary to the pleadings and proofs. The Court of Appeals then noted that any movement of the automobile and any slowing of the train by an earlier application of the brakes could have changed substantially both the nature of the accident and the nature of the injuries suffered therefrom. Under the record supplemented by facts judicially noticed by the Court of Appeals, the Court of Appeals concluded that the new record presented facts from which a jury could find Petitioner negligent and the Court of Appeals further concluded that the jury would find Petitioner negligent under the new record.

If we assume, *arguendo*, that the facts judicially noticed by the Court of Appeals were facts which could be properly noticed under the circumstances, the fallacy in the Court's reasoning is obvious. The jury could not possibly have permitted recovery on the theory advanced by the Court of Appeals since the facts upon which the theory was based were never presented to the jury. If the facts thus judicially noticed had been presented to the jury for its consideration in determining the ultimate facts in the case, the jury *might* have reached the same conclusion as the Court of Appeals, but, on the other hand, it might have reached a contrary conclusion based upon *all* the facts of

the case. For example, if the jury accepted the judicially noticed facts that a modern automobile can be started and moved its own length in a very few seconds, it would not be compelled to conclude, as did the Court of Appeals, that Respondents' automobile could be started and moved its own length in a very few seconds in view of all the other evidence in the case. If, however, the jury were to accept this latter premise, then it would not be compelled to find that Petitioner's diesel engineer was under a duty to immediately apply the brakes when the automobile stalled on the crossing, as claimed by Respondents (93b), since the jury would be entitled to consider the fact that the automobile could have been moved from the track in a very few seconds and, therefore, there was no immediate duty on the part of Petitioner to apply the brakes of its train when the train was almost one-half mile from the crossing (2,380 feet), but rather the duty arose only after Petitioner had a reasonable time to ascertain whether or not the automobile would move to a place of safety. These two factors are so intertwined the jury should have been permitted to consider them together.

In the instant case the Court of Appeals has inadvertently usurped the fact-finding prerogative of the jury. By taking judicial notice of certain facts the Court of Appeals has resolved all disputes on these facts in favor of Respondents and has reached conclusions from the facts thus judicially noticed in favor of Respondents without permitting the jury to determine the truth of the facts and without permitting the jury to draw its own legitimate inferences from all the facts thus determined.

It is axiomatic that the right to a jury trial of factual issues is one of the most jealously guarded rights of litigants under the Seventh Amendment to the Constitution

of the United States. As this Court said in *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, at 387, 388:

> "This was what was done in the present case. It may be that the conclusions of fact reached and stated by the court are correct, and, when properly ascertained, that they require such a judgment as was rendered. That is a question not before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the court, in entering a judgment against him on its own view of the evidence, without the intervention of a jury. In this particular, we think error has been well assigned.
>
> "The right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing. Rev. Stat., §§648, 649.
>
> "This constitutional right this court has always guarded with jealousy. *Elmore v. Grymes*, 1 Pet. 469; *De Wolf v. Rabaud*, 1 Pet. 476; *Castle v. Bullard*, 23 How. 172; *Hodges v. Easton*, 106 U.S. 408."
>
> "In principle, these cases are decisive of the question arising on the motion for judgment on the evidence notwithstanding the verdict. They show that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence, and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency

> or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict or disregard one when given, and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of a jury, unless the right thereto be waived. It is not a question of whether the facts are difficult or easy of ascertainment, but of the tribunal charged with their ascertainment, and this, we have seen, consists of the court and jury, unless there be a waiver of the latter.

In the instant case, the Court of Appeals by the improper taking of judicial notice of material facts and by its subsequent conclusion that jury issues were presented by the record thus supplemented (thus entitling Respondents to judgments on *prior* verdicts based upon a different record which did not include the facts judicially noticed) deprived Petitioner of its constitutional right to have *all* facts submitted to the jury so as to permit the jury, not the Court of Appeals, to determine from all the evidence the ultimate conclusions to be reached on the factual issues.

4. The jurisdiction of the District Court was invoked solely by reason of diversity of citizenship of the parties. Under the circumstances the Court was bound to apply the substantive rules of law of the State of Michigan in deciding the issues before it. As this Court said in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, at 555:

> "The Rules of Decision Act, in effect since the First Congress of the United States and now found at 28 U.S.C. §1652, provides: 'The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise

require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.' This Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, held that judicial decisions are laws of the states within its meaning. But *Erie R. Co. v. Tompkins* and its progeny have wrought a more far-reaching change in the relation of state and federal courts and the application of state law in the latter whereby in diversity cases the federal court administers the state system of law in all except details related to its own conduct of business. *Guaranty Trust Co. v. York*, 326 U.S. 99."

As pointed out before, the theory of recovery pleaded by Respondents in the District Court was that the automobile was stalled (9a), helplessly disabled (11a), and in a position of inextricable peril (13a) on Petitioner's track at the time the train was approaching, and Petitioner was negligent in failing to stop the train in time to avoid the accident (10a). There was absolutely no proof introduced which would permit the jury to find for or against the first allegation, and Respondents repeatedly admitted throughout the trial that Petitioner's train could not have been stopped in the distance afforded after the automobile stalled on the track (2b, 3b, 65b, 66b, 91b).

Under these circumstances it is well settled, under Michigan law, that the evidence was legally insufficient to sustain a jury verdict under the theory of recovery pleaded. Under Michigan law juries are not permitted to find facts without any proofs, and juries may not resort to speculation and conjecture to determine facts. *Walsh v. Grand Trunk Western Railroad Company*, 363 Mich. 522, 110 NW 2d 799; *Kaminski v. Grand Trunk R. Co.*, 347 Mich. 417, 79 NW 2d 899.

The Respondents failed to prove facts to support their theory of recovery in the District Court. The Court of Appeals patently recognized Respondents' failure in this respect when it took judicial notice of certain material facts to supplement the record. However, the facts judicially noticed, and the inferences drawn therefrom by the Court of Appeals, do not support Respondents' theory of recovery alleged in the District Court, i.e., that the automobile *could not be moved* from the tracks. Instead, the judicially noticed facts, and the inferences drawn therefrom by the Court of Appeals, support an opposite theory of recovery, i.e., that the automobile *could be moved* from the tracks.

Under the well established Michigan law recovery is not permitted where the evidence does not present the theory pleaded in the Trial Court. *Scott v. Cleveland*, 360 Mich. 322; 103 N.W. 2d 631. In that case, plaintiff alleged that the accident resulted from defendant driving her motor vehicle into the rear of a taxicab which was proceeding in the same direction and which had come to a sudden stop. At the trial of the case plaintiffs attempted to prove that the accident was caused by the taxicab suddenly swerving into another lane. The Supreme Court of Michigan reversed a judgment for plaintiff, holding, in effect, that plaintiff could not prove negligence of defendant on a theory not alleged in the pleadings, even though the proofs presented would support a recovery on the new theory.

The decisions of this Court and the decisions of several Courts of Appeals, as well as the general rule, hold that the courts may not take judicial notice of facts not alleged by Respondents, thereby changing the case from that which they pleaded. In *Mountain View Mining and Milling Com-*

pany v. McFadden, 180 U.S. 533, this Court said, at page 535:

> "But the Circuit Court could not make plaintiffs' case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading."

The above stated principle was followed in *Visayan Refining Co., Inc. v. Standard Transp. Co., et al.*, 17 F. 2d 642, where the Court said, at page 644:

> "Nor can the Court, by taking judicial notice of facts which are not alleged, change the case from that stated by plaintiff."

The Court of Appeals for the Second Circuit in *Williams v. Pennsylvania Railroad Company*, 313 Fed. 2d 203 (CA-2, 1963), held that where a theory of recovery found valid on appeal differed from the theory of recovery relied upon at trial, the case was remanded to permit defendant to present evidence to negate liability on the new theory of recovery.

The Court of Appeals for the Ninth Circuit in *Union Pacific Railroad Company v. Johnson*, 249 Fed. 2d 674 (CA-9, 1957), refused to permit the parties to change the theory of facts on appeal where the theory was not pleaded in the District Court.

The Court of Appeals for the Seventh Circuit in *Taylor v. Bennett*, 323 Fed. 2d 607 (CA-7, 1963), refused to permit appellant to claim a new theory of recovery on appeal where the theory was not embraced in the Complaint and where the trial judge did not instruct on the new theory. The Court of Appeals for the Seventh Circuit also held in *Peters v. Fitzpatrick*, 310 Fed. 2d 704, that appellant must

adhere to the same theory of facts on appeal as was presented at trial.

The general rule is stated in *31 C.J.S., Evidence,* §9, footnote 88 (2), where it is stated:

> "It is not within the scope of judicial notice principle to take controversial matters out of case and court will not take judicial notice of matters inferentially at variance with pleading."

In the instant case, the Court of Appeals, in taking judicial notice of facts to support a theory of recovery contrary to that which was pleaded, has decided a question of evidence and practice contrary to the decisions of this Court, contrary to the decisions of several of the Courts of Appeals, contrary to the law of the State of Michigan, and contrary to the general law.

5. Where jurisdiction of the Federal Court is based solely upon diversity of citizenship, is it error for the Court of Appeals to reinstate jury verdicts based upon ultimate facts derived by speculation and conjecture and the pyramiding of inference upon inference and presumption upon presumption?

Stated generally, the Opinion of the Court of Appeals indicates that if the brakes of the train had been applied sooner additional time would have been afforded in which to permit Respondents' driver to start and move the automobile somewhat, and this fact, coupled with the reduced speed of the train, could have substantially changed the nature of the injuries suffered. In order for the jury to reach the foregoing ultimate conclusions of fact, as did the Court of Appeals, the jury would be compelled to reason as follows:

(a) The jury would have to take judicial notice, as did the Court of Appeals, that a modern automobile can be started and moved its own length in very few seconds since there was a complete absence of proof on this point.

(b) Based upon the aforementioned judicial notice, and without any proof, the jury would have to infer, as did the Court of Appeals, that a secondhand three-year old automobile can be started and moved its own length in a very few seconds.

(c) Based upon the judicial notice in (a) above and the inference in (b) above, and without any proof, the jury would have to find, as did the Court of Appeals, the Zatek automobile was mechanically capable of being started and moved under its own power.

(d) Based upon the judicial notice in (a) above and the inferences contained in (b) and (c) above, the jury would have to infer as did the Court of Appeals, that Mrs. Zatek was a capable driver, sufficiently proficient to start and move her automobile its own length in very few seconds, contrary to the undisputed testimony that she was a new driver operating on a temporary license, and admittedly "unfamiliar with the operation of a motor vehicle as to the mechanical aspects" (8a, 15a).

(e) Based upon the judicial notice in (a) above and the inferences in (b), (c) and (d) above, and without any proof, the jury would have to further infer, as did the Court of Appeals, that if the brakes of the train had been applied earlier, sufficient time would have been afforded to permit Mrs. Zatek to start and move the automobile somewhat.

(f) Based upon the judicial notice in (a) above and the inferences in (b), (c), (d) and (e) above, and without any proof, the jury, by inference only, as did the Court of Appeals, would have to find as a matter of fact that any movement of the automobile and any slowing down of the train would have in fact (not could have) substantially changed the nature of the accident.

(g) Based upon the judicial notice in (a) above and the inferences in (b), (c), (d), (e) and (f) above, and without any proof, the jury, by inference alone, as did the Court of Appeals, would have to find as a matter of fact that if the nature of the accident would have been substantially changed, the nature of the injuries therefrom would have (not could have) changed substantially.

(h) Based upon the judicial notice in (a) above and all of the inferences and assumptions referred to in (b), (c), (d), (e), (f) and (g) above, and without any proof whatsoever, the jury would have to determine by pure guess, speculation or conjecture, as did the Court of Appeals, that the injuries which they found would have been substantially changed by reason of the inference in paragraph (g) above, that they would not have been fatal to three of the four plaintiffs, and they would not have been disabling to the surviving plaintiff.

To permit a jury to engage in an eight step chain of inferences based upon inferences, suppositions upon suppositions, assumptions upon assumptions, and conjectures upon conjectures as it would be compelled to do in order to reach the ultimate conclusion arrived at in this case has always been prohibited by the law of Michigan and

also by the courts of the United States. It has always been the well established law of Michigan that a jury will be permitted to draw reasonable inferences from established facts, but they are not permitted to thereafter draw another inference based upon the first inference in order to arrive at an ultimate conclusion. This rule of law was well stated by the court in *Standard Drug Store v. A. E. Wood & Co.*, 227 Mich. 333, where the Court said, at page 338:

> "Inability to meet legal requirements of evidence in support of a theory does not brush aside rules and open the way to supposition and inferences without evidentiary support. Presumptions and inferences may be drawn from facts established but may not rest, presumption upon presumption or inference upon inference."

This principle was also recognized at an early date by this Court in *United States v. Ross*, 92 U.S. 281, where the Court said, at pages 283, 284:

> "These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. *Starkie on Evid.*, p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by *direct* evidence, as if they were the

> very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. *Best on Evid.*, 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. *Douglas v. Mitchell,* 35 Penn. St. 440."

The *Ross* case, *supra*, was followed in *Manning v. Insurance Co.*, 100 U.S. 693.

In the instant case, because of the lack of evidence in the record below, the Court of Appeals, under the label of "judicial notice," determined certain issues of fact as true which could only be arrived at by basing inference upon inference and presumption upon presumption, as noted above. The Court of Appeals then held that the jury could have arrived at the same ultimate facts in the same manner.

It has long been held by this Court and the Supreme Court of Michigan that juries may not arrive at ultimate facts in this manner. To permit the Court of Appeals, under the guise of judicial notice, to find certain facts from which it proceeds inferentially by basing inference upon inference to reach ultimate facts to sustain a jury verdict when the jury itself could not find such ultimate facts (because the law does not permit it to heap inference upon inference and presumption upon presumption) would make a mockery of the laws of evidence and would, as this

Court said in *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio, supra,* "turn the doctrine (of judicial notice) into a pretext for dispensing with a trial."

6. Where jurisdiction of the Federal Court is based solely upon diversity of citizenship in a negligence action arising out of an accident occurring in the State of Michigan, and under the circumstances, the law of the State of Michigan clearly holds that an alleged failure to maintain a proper lookout is not a proximate cause of the accident, is it error for the Court of Appeals to refuse to apply the substantive law of the State and substitute its own rule of proximate cause?

In the instant case it was admitted in the District Court that Petitioner's train was unable to stop in the distance afforded after Respondents' automobile stalled on the tracks (2b, 3b, 65b, 66b, 91b). The undisputed proof showed that if the brakes of Petitioner's train had been applied 2380 feet west of the crossing where Respondents claim, under proofs most favorable to them, the lead engine of Petitioner's train was at the time Respondents' automobile stalled on the track (34b, 35b, 53b, 54b, 122a. 64b, 65b, 89b, 90b, 91b, 93b), Respondents' automobile would have been struck by the train at a speed of approximately 40 miles per hour (53b, 54b, 22a).

Under the foregoing circumstances, the law in Michigan is crystal clear that the alleged failure to maintain a proper lookout is not a proximate cause of the accident because the proofs show that even if a proper lookout would have been maintained, the accident could not have been avoided. *Buchthal v. New York Central Railroad Company,* 334 Mich. 556, 55 NW 2d 92. In that case the Supreme Court of Michigan said at page 563 (55 N.W. 2d at p. 95):

> "It is obvious that, under plaintiffs' own testimony, had the train crew realized that the motorist intended to continue across the tracks it would have been too late to prevent the accident. Whether they made an actual observation becomes immaterial."

In *McGuire v. Rabaut*, 354 Mich. 230, 92 N.W. 2d 299, the court reaffirmed the rule of the *Buchthal* case, *supra*, by saying, at page 240 (92 N.W. 2d at p. 304):

> "The favored driver's negligence in not looking was not, as a matter of law, a proximate cause of the collision. Even had he looked, diligently, there was nothing he could have done, after discovery of the danger, upon these facts, to avoid collision. The deficiency in plaintiff's case lies in the area of proximate cause."

In *Hoover v. Detroit, Grand Haven & Milwaukee Railway Co.*, 188 Mich. 313, 154 N.W. 94, the Supreme Court of Michigan reached the same result when the proofs showed that plaintiffs came upon defendant's railroad tracks when the train was then too close to their position to have possibly stopped in time to have avoided the accident.

The jurisdiction of the District Court being invoked solely on the basis of diversity of citizenship, the Federal Court was bound to apply the substantive rule of proximate cause as set forth by the Supreme Court of Michigan. *Cohen v. Beneficial Loan Corp., supra.*

In the instant case the Court of Appeals was in error for failing to hold that the alleged failure to maintain a proper lookout was not a proximate cause of the accident as required by the clearly applicable Michigan law on proximate cause. Instead, the Court of Appeals applied its own rule of law on proximate cause and permitted a jury to find the alleged failure to maintain a proper lookout was a proximate cause of the accident.

7. Where jurisdiction of the Federal Court is based solely upon diversity of citizenship in a negligence action arising out of an accident occurring in the State of Michigan and no state court, statute, ordinance, rule or regulation has placed a duty upon Petitioner to alter the speed of its trains in the area where the accident occurred, is it error for the Court of Appeals to permit a jury to establish such a legal duty?

In the instant case it is undisputed that the State of Michigan had passed no statute governing the speed of Petitioner's trains; the City of Livonia had passed no ordinances restricting the speed of Petitioner's trains; and the Interstate Commerce Commission had not, in any manner, restricted the speed of Petitioner's trains in the area where the accident occurred. The Michigan Public Service Commission to whom the State of Michigan had delegated its police powers over Petitioner by statute (C. L. 1948, §462.44, Appendix I, *infra*), and which Commission was asserted by Respondents to have exclusive jurisdiction to regulate the speed of Petitioner's trains (98b, 99b, 100b), had not, in any way, restricted the speed of Petitioner's train as it approached the grade crossing in question. On the contrary, the Michigan Public Service Commission knew that Petitioner operated trains in this area at speeds up to 80 miles an hour, and had specifically approved the crossing protection installation which permitted Petitioner to operate trains at speeds up to 80 miles an hour over this crossing (45b, 46b).

It is undisputed that as Petitioner's train approached the grade crossing it sounded all the warnings required, and the crossing protection, which was the maximum type available at grade crossings, was functioning properly. It

is not claimed that the crossing was in any way "extra hazardous."

Petitioner's train was approaching the grade crossing at a speed of approximately 60 miles an hour, at a point approximately 2380 feet from the crossing, at which time Respondents allege the driver stalled on the track.

It was Respondents' claim in the District Court that the jury had a right to consider the speed at which Petitioner approached the grade crossing as evidence of negligence, under all the circumstances. The only circumstances shown to have existed at the crossing was that the road was "heavily traveled" because of a general increase in the population and nearby business establishments.

Respondents were unable to point out to the District Court or the Court of Appeals a single case where the Supreme Court of Michigan permitted a jury to place a legal duty on the railroads to restrict the speed of their trains when approaching fully protected grade crossings when the protective devices are working properly and the train sounds the required warning signals. The Opinion of the Court of Appeals also fails to point out any Michigan case to support this proposition.

Petitioner admits that the law of Michigan permits a jury to consider speed as evidence of negligence, but only in cases where the evidence shows that there was a failure on the part of the railroad to give adequate warnings of its approach, or when the crossing protection devices were absent or not working properly, or where the speed was in excess of a restricting ordinance. Such is not the instant case. Speed in the instant case can only be material if there is a duty upon Petitioner to operate its trains at such a rate of speed as to permit them to stop in time to avoid an accident when someone thoughtlessly comes upon Petitioner's tracks in front of an approaching

train. Respondents do not claim such a duty exists, and the law of Michigan does not require a railroad company to restrict the speed of its trains so they can be stopped in order to avoid an accident when someone thoughtlessly comes upon the tracks in advance of an approaching train. *The Lake Shore & Michigan Southern Railroad Company v. Mary J. Miller,* 25 Mich. 273; *Block v. Ann Arbor R. Co.,* 202 Mich. 341, 168 N.W. 526. This is precisely what occurred in the instant case, for the jury found Respondents' driver negligent in coming upon Petitioner's tracks when the train was in such close proximity thereto that it could not be stopped.

If we assume, *arguendo,* that Petitioner was under a duty to limit the speed of its trains approaching the grade crossing merely because the street upon which Respondents' driver approached the crossing was "heavily traveled," Respondents still should not prevail, for there was a complete absence of proof that the mere fact the road was heavily traveled was a proximate cause of the accident. In short, the fact that the street was heavily traveled did not cause Respondents' automobile to stall on the crossing, nor did it in any way prevent Respondents' driver from moving off the tracks.

The Court of Appeals tacitly admits there are no Michigan decisions requiring Petitioner to restrict the speed of its trains under the circumstances of this case. While certain Michigan decisions are discussed, a brief examination of them brings to light that in each case the jury was permitted to consider speed as evidence of negligence because coupled thereto was evidence that the train failed to sound adequate warnings, or warning devices were not operating, or there was a restricting speed ordinance, or a combination of all three circumstances. Because there are no controlling Michigan decisions, the Opinion of the

Court of Appeals is based upon common law decisions from other jurisdictions and upon the federal common law as set forth in *Grand Trunk Railway Company v. Ives*, 144 U.S. 408, which case is no longer applicable by reason of this Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64.

In applying the law of foreign states and the federal common law which would permit a jury to find negligence based upon the speed of Petitioner's train, the Court of Appeals has placed upon Petitioner a duty which the law of Michigan has failed to place upon Petitioner. This action amounts to judicial legislation contrary to the decision of this Court in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, where this Court said, at page 215:

> "The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress—it is a question for law makers, not law interpreters. Our task is the more limited one of interpreting the law as it now stands."

CONCLUSION

For the reasons set forth above, and because of the demands of the law and substantial justice, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

DECISION OF THE DISTRICT COURT ON DEFENDANT'S MOTIONS TO SET ASIDE JURY'S VERDICTS AND TO ENTER JUDGMENTS IN FAVOR OF THE DEFENDANT IN FOUR OF THE CONSOLIDATED CASES (Dictated from the Bench) reported at 229 F.S. 61.

FREEMAN, District Judge.

These cases arise out of a railroad grade crossing accident involving one of the defendant's freight trains and a Chevrolet station wagon automobile owned by the plaintiff John Zatek, and are now before the Court on motions of the defendant Chesapeake and Ohio Railway Company to set aside jury verdicts and to enter judgments in favor of defendant in four of the five cases filed as a result of this accident and tried pursuant to an agreed order of consolidation.

The entry of judgment on a verdict of no cause of action in favor of defendant in the other companion case No. 21992 awaits the disposition of these motions.

The accident occurred on June 16, 1961, at about 4:30 P.M. when defendant's eastbound freight train struck the automobile then being driven by Mr. Zatek's wife, Lois Jane Zatek, in a southerly direction on Middlebelt Road, in the City of Livonia, Wayne County, Michigan, which automobile had stalled on the track in the path of defendant's oncoming train. Three small children of Mr. and Mrs. Zatek were also occupants of the car. Mrs. Zatek and two of the children were killed. The other child was injured, and the automobile was demolished. As a result, five separate suits were filed against the railroad by Mr. Zatek and the personal representatives of the estates of the deceased wife and children, and the guardian of the estate of the injured child.

Plaintiffs claimed at the outset of the trial that the railroad was negligent in failing to perform certain alleged duties, and also invoked the doctrines of an extra hazardous crossing and last clear chance, all of which were withdrawn by plaintiffs at the close of their testimony, except the claims that (1) the speed of the train was excessive; and (2) the engine crew failed to keep a proper lookout at the crossing, on which issues the cases were submitted to the jury, together with the issue of contributory negligence based on defendant's claim that Mrs. Zatek, the driver of the car, was guilty of negligence which would bar recovery in her case, and which was also the sole proximate cause of the accident, which would bar recovery in the other cases.

Middlebelt Road at this crossing was a straight, level, paved, 4-lane highway, extending in a north and south direction. Defendant's tracks, consisting of two main lines and three spur tracks, crossed the highway at right angles, and extended straight and almost level both east and west for several miles from the crossing, which was approximately 1½ feet above the level of Middlebelt Road measured from a point about 100 feet north of the crossing. There was a race track on the east side of Middlebelt Road, and a Kroger Company warehouse on the west side of the road, both north of the crossing. There was a Ford Motor Company laboratory and parts depot on the west side of Middlebelt Road south of the crossing. Otherwise, except for a few scattered buildings, the surrounding area for a mile in every direction from the crossing was characterized as "open, pretty much open" by plaintiff's witness Thorne, a Livonia police officer. There was no obstruction to the view of a southbound motorist of trains approaching the crossing from either direction.

This crossing had maximum statutory protection, consisting of flasher lights and bells, with the customary crossbuck "Railroad Crossing" sign, and half-gates which were installed in 1950 pursuant to an order of the Michigan Public Service Commission. The day was bright and warm. Visibility was unusually good at the time of the accident.

The defendant's engine was blowing its whistle and ringing its bell. The protective devices and signals at the crossing were all in good operating condition.

In this setting Mrs. Zatek, with her three children in the car, approached the crossing from the north, and the car stalled on the third set of tracks, which would be the middle set of tracks, in the path of defendant's eastbound freight train, resulting in the disaster already mentioned.

Defendant's motions for directed verdicts, made at the close of plaintiffs' proofs, were denied, and were renewed at the close of all the testimony, which motions were then taken under advisement. The jury rendered a verdict of no cause of action in the case for the wrongful death of Mrs. Zatek, and rendered verdicts in favor of plaintiffs in the other four cases.

The instant motions of defendant to set aside the verdicts in favor of plaintiffs and to enter judgments of no cause of action in all cases followed. Oral arguments were heard on September 24, 1962, and again briefly on this date.

Plaintiffs contend that the issues of (1) whether the speed of the train, or (2) whether the engine crew maintained the required lookout, constituted negligence on the part of the railroad, and the causal connection of such negligence with the accident were questions for the jury, and were properly submitted to the jury.

[1] Defendant contends that, as a matter of law, it was not guilty of negligence on either ground claimed by plaintiffs, and that the negligence of Mrs. Zatek in driving the car was the sole proximate cause of the accident.

In considering and deciding these motions, the evidence and all inferences which may reasonably be drawn therefrom must be viewed in the light most favorable to the plaintiff.

First of all, I will consider the issue of whether the speed of the train, under the circumstances then prevailing, was a question for the jury on the issue of negligence.

In a very fine annotation on this point, cited and referred to by counsel in their brief, and on oral argument, in 154 A.L.R. at page 213, and which appears to be the only annotation in this text that the court has been able to find, the author, at page 213, says:

> "It may be said that the general rule is that the question whether the speed of a train, locomotive or railway car at a highway crossing constitutes negligence depends upon the circumstances of the particular case."

At almost the outset of this annotation, the author says:

> "The recent trend of decisions, however, is to the effect that speed does not constitute negligence, in the absence of a statute or ordinance limiting speed, where adequate warnings of the approach of trains are given to persons using the highways, or where suitable protective measures have been resorted to, and that speed is only material where adequate warnings are not given or such protection is not afforded."

At pages 1390 and 1391 of 74 C.J.S. Railroads §744, the text reads as follows:

> "In the absence of statutory or municipal regulations a railroad company has the right to use its discretion in establishing the speed of its trains; but the mere fact that there is no statutory limitation on the speed of trains through cities does not permit a negligent, excessive rate. Generally no rate of speed consistent with the safety of passengers and freight is negligence per se. However, under the rule of the common law requiring a company to exercise its franchise with due regard to the safety of its passengers and such persons as may travel on a highway crossing its tracks, it is the duty of the company, in establishing the rate of speed at which its trains may be run, and of the trainmen in operating the train, to exercise due regard not only to the safety of passengers, but

> also to that of all persons in the exercise of ordinary care traveling on the highway across its tracks; and whether the rate of speed in any particular case is reasonable or negligent depends on the nature of the crossing and other circumstances of the case."

[2] The law is well settled in Michigan that it would not be negligence for a railroad to operate its trains at a rapid rate of speed through open rural country. See Elias v. Collins, 237 Mich. 175, 211 N.W. 88, 52 A.L.R. 1118; Buchthal v. N.Y.C. R.R. Co., 334 Mich. 556, 55 N.W.2d 92. Also see Penn. R.R. Co v. Stegaman, a 6th Circuit case, reported in 22 F.2d 69, applying Ohio law; Carter v. Pennsylvania, another 6th Circuit case, reported in 172 F.2d 521, also applying Ohio law; and Plough v. Baltimore & O. R.R., a 2nd Circuit case, reported in 172 F.2d 296, applying New York Law.

In the Buchthal case the train was proceeding at a speed of 80 miles an hour, according to the engineer, and struck plaintiff's automobile at a rural crossing. In that case the court said, at page 562 of the opinion in 334 Mich., at page 95 in 55 NW.2d:

> "We held that the general rule is that when running through open country the speed of trains is not limited. We cited Robinson v. Flint & P.M. R. Co., 79 Mich. 323, 44 N.W. 779, an early case, where we held that a speed of 60 miles an hour was not evidence of negligence. In Shufelt v. Flint & P.M. R. Co., 96 Mich. 327, at page 329, 55 N.W. 1013, at page 1013, we said: 'Trains are not limited in the rate of speed they may run in the country, and across the public highways, where the travel is limited.'"

[3] It also seems clear, under the law of Michigan, that whether the speed of a train through a village or city may constitute a question for the jury as to the issue of negligence depends upon the circumstances of each case. See Hudson v. G.T.W. R.R., 227 Mich. 1, 198 N.W. 339, and

Morgan v. Detroit, J. & C. Ry., 234 Mich. 497, 208 N.W. 434.

The circumstances to be considered on this issue, among others, as set out in the Morgan case, at page 501 of the opinion in 234 Mich., 208 N.W. 434, consists of several factors:

(1) The population of the village or city;

(2) How well the crossings were guarded;

(3) How straight the track was;

(4) How much travel there was in the village or city;

(5) To what extent was the view of the railroad track obstructed.

There is no statutory speed limit on trains in Michigan, and the city of Livonia has not restricted the speed of trains by ordinance.

Defendant's train involved in this incident consisted of 79 freight cars, 61 loaded and 18 empty, a caboose and a 3-unit diesel locomotive, having an over-all length of 3720 feet. The total weight of the train was 4375 tons, according to the defendant, and 4136 tons according to the plaintiffs. The flashing lights, bells and gates at the crossing were automomatically actuated by the lead unit of a train at the point of an actuating device attached to the track 3018 feet west of the crossing. The front of the diesel engine stopped 2632 feet east of the crossing after the accident, according to the testimony of plaintiffs' witnesses. There is a delay of 1½ seconds after the train reaches the actuating device in the track before the flasher lights and bells at the crossing start to operate. There is an additional delay of 5 seconds before the gates start to descend, which is in accordance with the regulations of the Michigan Public Service Commission. Eleven seconds is required for the gates to reach a fully horizontal position after they start to descend.

Plaintiffs' expert witness Kurt testified that the ordinary average human reaction time is three-fourths of a second. None of plaintiffs' witnesses saw Mrs. Zatek drive upon the track where the car stalled, and therefore were unable to say how long the car was on the track when it was struck. Two of these eye witnesses testified that the gates were down and the lights were flashing when they first saw the Zatek car, at which time it was stalled on the track. Another witness saw the car stalled on the track, but has no recollection as to the position of the gates at that time.

Another of plaintiffs' eye witnesses, Jerome Fine, testified that the automobile was standing still on the track when he first observed it, at which time "the gates were coming down," immediately followed by the further answer of the eye witness Fine: "They were a quarter of the way down."

Defendant offered the testimony of two witnesses who saw the accident to the effect that the Zatek car was going very slow as it approached the crossing, and passed under the north gate in a so-called creeping manner as the gate was descending, before stopping on the track. The distance from the gate to the track where the accident happened was 43 feet.

I cannot consider the testimony of defendant's witnesses with respect to this point, because I must weigh the evidence in the light most favorable to the plaintiffs. I merely make reference to that testimony to indicate that there were other witnesses who claimed to have seen the Zatek car approach the crossing and stop on the track.

Having offered no direct evidence of the movement of the automobile as it approached the crossing, or how long it was on the track before the impact, plaintiffs relied on the time interval of 6½ seconds after the train reached the device for actuating the crossing flashers and gates, 3018 feet west of the crossing, before the gates started to descend, at which time the witness Fine said that Mrs. Zatek was on the track, plus three-fourths of a second reaction time for the engineer to apply the brakes, making a total

of 7¼ seconds which elapsed after the train triggered the actuating device, and was some evidence, according to plaintiffs, of the position of the engine when Mrs. Zatek was on the track, at which time plaintiffs claim the engineer should have applied the brakes.

Plaintiffs' expert witness Simpson testified that if the brakes on the train were applied 1185 feet west of the crossing, as stated by the engineer to one of plaintiffs' witnesses, the speed of the train at that point would have been 62.8 miles per hour; and the stopping distance of the train, after application of the emergency brakes, under those circumstances, would be 3817 feet.

Defendant's answers to plaintiffs' interrogatories state, among other things, that the speed of the train was about 60 miles per hour when the brakes were applied. Plaintiffs' witness Eldridge, an employee of the Ford Company, who testified that he saw the train as it approached the crossing and the resulting accident, estimated the speed of the train to be 65 miles an hour as it approached the crossing, at which speed the stopping distance of the train, with brakes applied, according to the witness Simpson, would be 4192 feet. The stopping distance of the train, with brakes applied, at 60 miles an hour, would be 3586 feet, according to this same witness.

Plaintiffs offered additional testimony by their expert witness Simpson to the effect that if the train was going 60 miles an hour, which would be 88 feet per second, and the brakes were applied 7.2 seconds after the train reached the device for actuating the flashers and gates, the lead engine of the train would then be 2380 feet west of the crossing when the brakes were so applied, and the train would be going 40 miles an hour at the crossing. The witness Simpson also testified that if the brakes were applied 1185 feet west of the crossing, as stated by the engineer, and if the train was then going 62.8 miles per hour, as calculated by this expert witness, the train would be going 55 miles an hour at the crossing. In any event, if the train was going 60 miles an hour, or 62.8 miles an hour,

or 65 miles an hour, when the brakes were applied, as indicated by the testimony most favorable to the plaintiffs, the train would be going at a fairly rapid rate of speed at the crossing.

The flashing lights, bells and gates were installed pursuant to Sec. 22.768 of Michigan Statutes Annotated, Comp. Laws 1948, §469.8, which provides in part as follows:

> "Whenever flashing lights are installed at any crossing and the Michigan public utilities commission shall find it necessary, they shall be so arranged that for every train or switching movement over the crossing, the flashing lights shall be in operation for a period of not less than twenty [20] seconds nor more than sixty [60] seconds in advance of the train movement reaching the nearest established curb line of the highway and the flashing lights shall continue to operate until the train movement has passed the established curb line on the near side of the highway."

I interpret that statute to mean, as I indicated during the trial of the case, that there must be a warning of at least 20 seconds, by flasher lights at the crossing, before the train reaches the crossing, and that the lights are not permitted to be in operating condition, that is, flashing, for more than 60 seconds before the train reaches the crossing, in order to not unduly interfere with the movement of traffic upon the highway.

The flasher lights, bells and gates at this crossing were installed in 1950, pursuant to an order of the Michigan Public Service Commission, as I have already indicated. Subsequently the highway was widened from a 2-lane pavement to a 4-lane pavement in 1954, and the flashing lights and gates were moved to accommodate the change in the width of the highway.

In 1956 two additional spur tracks were installed at the crossing, making a total of 5 tracks which existed on the day of the accident, and the flasher lights and gates were again moved to permit that change of conditions.

In ordering the installation of the gates and flasher lights in 1950, the Michigan Public Service Commission authorized or ordered that the device for actuating the flasher lights and gates be installed 3018 feet west of the crossing. At that time the average speed of defendant's freight trains over the crossing, as I remember it, was about 50 miles an hour, and the speed of its passenger trains was about 80 miles an hour.

When Middlebelt Road was widened in 1954, and when the additional spur tracks were installed in 1956, and in 1961 at the time of the accident, it is my recollection that the average speed of the defendant's freight trains across this crossing was about 60 miles an hour, and that the average speed of the passenger trains was about 78 miles an hour, or at least somewhat less than 80 miles an hour.

The orders of the Michigan Public Service Commission in 1954 and 1956, when the road was widened and the two spur tracks were installed, expressly provided that except for such changes the terms and provisions of the original order of 1950 were in full force and effect.

It is the contention of the plaintiffs that conditions and circumstances at and near the crossing changed subsequent to 1950. The testimony indicated that the number of vehicles on Middlebelt Road at or near this crossing, in October 1950, for a 24-hour period, was 7056 vehicles. In July 1961, possibly a month or less after the accident, the traffic count at this same point had increased to 27493 vehicles for a 24-hour period. The testimony also showed that the United States census for 1950 indicated the population of the City of Livonia as being 17,534; and the 1960 census indicated the population of the city to be 66,702. The testimony also indicates that the City of Livonia is 6 miles square, which would be 36 square miles.

The plaintiffs argue that the considerable increase in traffic on the highway and the considerable increase in population in the city are circumstances which are, in and of

themselves, sufficient to take the issue of speed as a ground of negligence to the jury.

I think I am correct when I say that these circumstances of increased traffic and increased population are the only substantial circumstances upon which the plaintiffs rely to constitute a jury question as to the speed of the train at the time of the accident. There appear to be no other special circumstances of the nature set forth in the Morgan case. The crossing had the maximum protection; the tracks were straight for several miles in each direction from the crossing; the highway and the tracks were level; there was no obstruction to the view of a southbound motorist of trains approaching from either direction. Furthermore, there is a lack of any evidence as to the concentration of population at or near this crossing. As a matter of fact, the record indicates that the area for a distance of approximately a mile in each direction, according to plaintiffs' witness Thorne, was open except for the race track, the Kroger warehouse, the Ford plant, and a few other scattered buildings mentioned in his testimony. As to the factor of population, I have computed that in an area as large as the City of Livonia, which is 36 square miles, a total population, if evenly distributed, would be an average of 1863 per square mile. This is not a heavy concentration of population. As a matter of fact, the testimony would indicate that the population in the area of the crossing was certainly not heavy.

[4] The court holds that the circumstances relied on by plaintiffs, namely, the factors of increased traffic and increased population subsequent to 1950 are not sufficient to constitute a jury question as to whether the speed of the train at the time of the accident was negligence.

I will now discuss the issue of whether there was any substantial evidence of failure of the engine crew to maintain a proper lookout, and, if so, whether such failure was a proximate cause of the accident. Again, I must consider the evidence and all inferences which may reasonably be drawn therefrom in the light most favorable to the plaintiffs. It now seems very clear, and shortly after this case

was tried the court concluded, that the lookout issue, under the evidence, should not have been submitted to the jury. As a matter of fact, plaintiffs, in support of their claim in this respect, rely almost entirely on some of the evidence of the witness Eldridge who testified on direct examination that the speed of the train did not change before the impact, and that the brakes were being applied on the train about two or three seconds after the impact. On cross-examination this witness admitted he was in error in stating that the speed of the train did not change prior to the impact, or at least that his observations in that respect were not proper, as indicated by the following testimony given by this witness on cross-examination:

"Q. You feel that your estimate is accurate, within one mile an hour?

A. No, I don't think so.

Q. Well, that is what I am asking you, sir, that as you were watching this train approach the crossing, isn't it conceivable that this train's speed could have been reduced some?

A. Possibly.

Q. And you not have been able to appreciate the difference with the naked eye?

A. I could not.

Q. You couldn't fairly say one way or the other, then, as far as your observations are concerned?

A. I could not."

Then, on redirect examination, covering the same matter, the witness Eldridge testified:

"Q. I believe you also said you couldn't tell a slight variation one way or another. Do you think you could have observed whether there was a large variation in speed as you watched the train approach?

A. A large variation, no.

Q. You could not have told whether there was a large variation in speed while you were watching the train?

A. You mean variation in speed?

Q. Extreme increase in speed greatly, or decrease in speed greatly, while you were watching it; do you think you could tell that?

A. I couldn't, no.

Q. You couldn't?

A. No."

[5] It is the contention of defendant that under the evidence in this case, viewed in the light most favorable to the plaintiffs, that any failure on the part of the crew to maintain a proper lookout could not have been a proximate cause of the accident which occurred. It is settled law in Michigan, and the general rule seems to be, that unless a proper lookout would have enabled the train crew to have avoided the accident, an improper lookout upon the part of the crew is not a proximate cause of the accident. See Buchthal v. N.Y.C. R.R. Co., 334 Mich. 556, 55 N.W.2d 92; also see the case of Markar v. N.Y., etc., R.R., a 2nd Circuit case reported in 77 F.2d 282, 283.

In other words, if the accident would have happened without defendant's negligent act, then such act was not the cause of the accident. See Lekas & Drivas, Inc. v. Goulandris, a 2nd Circuit case, reported in 306 F.2d 426, at page 430, citing 2 Harper and James, The Law of Torts, Sec. 20.2, at page 1114; and The American Law Institute of Torts, Sec. 432, comment "B" and illustrations 1 and 2.

Plaintiffs argue that the train crew's alleged improper lookout substantially contributed to the accident, and consequently was a proximate cause of the accident, and cite Prosser on Torts, 2nd edition, at page 252, in support of their position.

[6] The court has examined this authority, and notes, as Dean Prosser points out, on pages 220 and 221 of his work, that the substantial contribution theory only applies if two causes concur to bring about an event, and either one of them operating alone would have been sufficient to cause a similar result. This is not the instant case, since the alleged improper lookout of the train crew stand-

ing alone, without the negligence of Mrs. Zatek, would not have caused the accident and ensuing injury and death. In other words, any improper lookout by the train crew, under the evidence in this case, viewed in the light most favorable to the plaintiffs, was not a substantial factor in causing the accident and the accompanying death and injury.

In this connection it should be pointed out that the jury, by its verdicts, found that Mrs. Zatek was guilty of negligence, which barred recovery in her wrongful death case.

The next step from this holding is to decide whether or not her negligence was the sole proximate cause of the accident. The cases relied on by plaintiffs on this issue are clearly distinguishable from the instant case. Ommen v. G.T. R.R. Co., 204 Mich. 392, 169 N.W. 914, did not involve any issue of proximate cause, but only the duty of the railroad as to ringing its bell near the crossing, its duty concerning what speed it could travel over the crossing, and the plaintiff's contributory negligence.

The case of Day v. Pere Marquette R.R. Co., 252 Mich. 589, 233 N.W. 425, involved the precise question of plaintiff's contributory negligence. The court in its opinion indicated that a flagman's action in that he warned the public of a freight train which had just passed, and then walked off to the side of the road to talk to another person, and consequently failed to warn the public of the oncoming passenger train which hit plaintiff, presented questions of fact for the jury.

In Block v. Ann Arbor R.R. Co., 202 Mich. 341, 168 N.W. 526, there was evidence that the train did not slacken its speed until it had practically hit the plaintiff's wagon, and that the train hit the wagon just forward of the hub of the rear wheel. In other words, if the train was going slower, or if the brakes had been applied sooner, plaintiff could have avoided the accident.

In Marcott v. Marq., H. & O. R. Co., 47 Mich. 1, 10 N.W. 53, it appeared that a neighbor could have saved the child

who was killed if he had reached him just a little earlier, or if the train had reached the point of injury perhaps two or three seconds later. The same is also true in Huff v. Michigan United Traction Co., 186 Mich. 88, 152 N.W. 936, where it appeared that a slight reduction in the speed would have prevented the accident and would have given the plaintiff a chance to pass across the tracks.

In the case of Hoover v. Detroit, Grand Haven and Milwaukee Railroad, 188 Mich. 313, 154 N.W. 94, the court held that where the testimony showed the train could not have been stopped to avoid the accident after the children appeared on the track, it was not error to direct a verdict for the defendant.

[7] In the instant case there is no testimony to indicate that Mrs. Zatek would have been able to start her car should additional time have elapsed before the train reached the crossing. There is no evidence that she was making any effort to get out of the car. As a matter of fact, the testimony all indicated, by witnesses testifying for both parties, that she was trying to get the car started. It should also be noted in this respect that Mrs. Zatek, as I recall the testimony, was a new driver. She had only a temporary driving permit, and her driver's license was received at her home after her death. This may have been a significant factor. In any event, if the speed of the train, under the circumstances here, was not a question for the jury, on the issue of negligence, then the issue of failing to maintain a proper lookout as constituting negligence would be of no consequence, because if the speed of the train, under the circumstances, was not a triable issue for the jury to decide, then the negligence of Mrs. Zatek was clearly the sole proximate cause of the accident.

Reverting briefly to the speed issue, this court directs attention to three decisions: the case of Markar v. New York, etc. R.R., a 2nd Circuit case, reported in 77 F.2d 282, 283; the case of Engberg v. G.N. Ry. Co., 207 Minn. 194, 290 N.W. 579, which case was the subject of the annotation in 154 A.L.R. 206; and the case of Conner v. Penn. R.R., an Eastern District of Pennsylvania case, reported

in 163 F. Supp. 718. These cases all held that where a crossing is guarded by automatic signalling devices, and these devices were properly operating at the time of the accident, it was not negligence as a matter of law for a railroad to run its trains at speeds of 50 or 60 miles an hour over such guarded crossing. The opinion of the 2nd Circuit in the Markar case is almost identical in all material aspects with the instant case. In that case the accident happened at a crossing guarded by automatic signalling devices, located on a much traveled highway, in a Connecticut town. The evidence also disclosed that the signalling devices were installed pursuant to orders of the Connecticut Public Service Commission, that the speed of the train was 60 miles an hour, and that there was no restrictive order against such speed by any state or municipal authority. The Markar case is the closest case on the facts to the instant case that counsel have cited or that the court has been able to find by independent research.

Other cases cited by plaintiffs in support of these issues are and can be distinguished. I shall not take the time to do it, but I refer specifically to the Morgan case, 234 Mich. 497, 208 N.W. 434; Vernick v. Detroit, etc., R.R., 224 Mich. 321, 194 N.W. 992; Tobias v. M.C. R.R. Co., 103 Mich. 330, 61 N.W. 514; Coston v. Ann Arbor Ry. Co., 201 Mich. 232, 167 N.W. 940; Guggenheim v. Lake Shore Railroad, 66 Mich. 150, 33 N.W. 161; and Ommen v. G. T. W. R.R., 204 Mich. 392, 169 N.W. 914.

Furthermore, the two cases cited by plaintiffs in their supplemental brief filed recently, with respect to the issues of lookout and proximate cause, are of no particular consequence, especially when considered in the light of the facts of this case. Neither case was a railroad case, and the facts were so different that they are of no consequence to the decision of the issues here involved.

Before concluding I desire to comment briefly on the case of Perch v. N.Y.C. R.R. Co., 294 Mich. 227, 293 N.W. 778, upon which the defendant relies so heavily. This court feels that that case turns on the issue of proximate cause,

and not on the question of the duty of a railroad regarding the speed of its train at a protected crossing. In that case the vehicle of plaintiff's decedent had come to a stop in front of the crossing when another vehicle hit the car of the plaintiff's decedent in the back and pushed it onto the track, and it was then struck by defendant's train which was admittedly proceeding at a speed in violation of a local ordinance, killing the plaintiff's decedent. The court, on rehearing, in a 5-to-3 opinion, held that the defendant's negligence in speeding was not a proximate cause of the accident, and that the sole proximate cause was the negligence of the other car in pushing the car of the plaintiff's decedent onto the track.

In the instant case, however, the same principle of proximate cause applies, since the train, as a matter of law, was not operating at a negligent speed under all the circumstances, as this court concludes, and also because the accident would have occurred regardless of the lookout maintained by the engine crew. In other words, the sole proximate cause of the instant accident was the negligence of Mrs. Zatek. And for a case involving these principles, and holding to that effect, see Pitcairn v. Brandes, a 6th Circuit case, reported in 87 F.2d 928, in which this court was involved as a practicing attorney.

There is one other thing I should say before closing, with respect to the lookout issue. As I have already indicated, the only testimony relied on by the plaintiffs in support of that claim is the testimony of the witness Eldridge, who did give testimony to the effect that the train did not slow down before the accident, and that the brakes were applied after the accident; he said "two or three seconds after the accident." It is inconceivable to this court that any witness, standing at a distance from the railroad, could testify to the application of the brakes on the train. This witness stated nothing from which such a conclusion could be drawn, except that he noticed sparks under the train at the crossing, and he testified that the train did not slow down before the impact, but later admitted both on cross-examination and on re-direct ex-

amination that even if the train had slowed down he would not have noticed it. In effect, that was what he said. From that tes- [timony the plaintiffs argue that the trains] having stopped 2632 feet beyond the crossing, that therefore the brakes were applied within that distance; and from that, based on testimony of the expert witness Simpson, they argue, from the stopping distance of the train within approximately that distance, the speed of the train would have been approximately 50 miles an hour; and had the train been proceeding at that speed, when the engineer should have seen Mrs. Zatek on the track, the train could have been either stopped or substantially stopped before the accident. This involved a complete repudiation of the testimony of the witness Eldridge as to his estimate of the speed of the train as being 65 miles an hour at the crossing. In any event, as I have previously stated, even though the evidence should justify an inference that the train crew did not maintain a proper lookout, and that such failure could have been a proximate cause of the accident, still in view of the holding of this court that the evidence of the speed of the train, viewed in the light most favorable to the plaintiff, and taking into consideration the condition of traffic and population, as I have already discussed, the lookout issue would be of no consequence, since the negligence of Mrs. Zatek in that event would necessarily have been the sole proximate cause of the accident.

I have probably overlooked some matters in dictating this decision from the bench. If so, it has not been intentional. I have spent a great deal of time on these motions. My conclusions are the best that I can do.

Therefore, the motions to set aside verdicts and enter judgments in favor of the defendant, in all five cases, are granted.

Appropriate orders and judgments may be submitted.

APPENDIX "B"

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT REPORTED AT 333 F. 2d 621

EDWARDS, Circuit Judge.

These appeals arise out of a tragic grade crossing accident where a mother and three of her children were in an automobile when it stalled on The Chesapeake & Ohio Railway tracks in the path of an 80-car freight train. The train crushed the car; killed the mother, who was driving; killed two of her children, and injured the third. These suits for wrongful deaths and injury were filed by representatives of the estates of the three deceased persons and the injured minor in the United States District Court for the Eastern District of Michigan, Southern Division, jurisdiction being established by diversity of citizenship.

At trial a Federal court jury in Detroit returned verdicts for the defendant in the driver's case, and for the plaintiffs in the case of the passengers. The jury verdicts for plaintiffs were set aside by the United States District Judge, and judgments non obstante veredicto were entered for defendant. Plaintiffs appealed in all cases, with the children's cases consolidated into one appeal.

The accident occurred at 4:30 p.m. June 16, 1961, on Middle Belt Road at the five-track C & O grade crossing in the City of Livonia. The crossing protection consisted of flasher signals and automatic short-arm gates. The train was a three-engine diesel pulling defendant's daily unscheduled freight train No. 52, consisting of 79 cars and a caboose, and approaching Detroit from the west.

The deceased driver, Mrs. Zatek, and her three children were in a station wagon headed south on Middle Belt Road. As she approached the crossing an automatic switch, lo-

cated 3,018 feet west of the crossing, was actuated by the freight engine and the flashers commenced and the gates began to come down. The exact relationship of these events to Mrs. Zatek's progress are in dispute. But three eyewitnesses all indicated that her car passed the gate and came to a stop on the track after the gate had started down.

Testimony also established that Mrs. Zatek and her children remained in the station wagon directly in the path of the oncoming freight train until the crash occurred—a matter of twenty seconds or more.

Witnesses testified that during these intervening seconds, Mrs. Zatek appeared to be turning the ignition key as if to attempt to start the motor; that the car "bucked" or "jerked" but did not move out of position. One witness thought he saw "puffs of exhaust."

A part of this tragic story is undisputed evidence that Mrs. Zatek had been driving an automobile for a period of only two weeks and was driving on a temporary driver's permit at the time of the fatal crash.

Estimates of the speed of the train varied from 55 m.p.h., by the train engineer, to 67 m.p.h., based on computations by plaintiffs' expert witness, a mechanical engineer. An eyewitness to the collision, an automotive test development engineer, testified that the train was going 65 m.p.h. This same witness stated that he did not observe any noticeable deceleration of the train until after the moment of impact.

Plaintiffs' expert witness, however, also testified that he had inspected the tachometer of this train, which kept a running speed tape, and that it showed a speed of 59 m.p.h.

Although the engineer and fireman involved were in the courtroom during the trial, they were not called on to testify by either party. However, plaintiffs' attorney on direct examination elicited the following from the first police officer who reported to the scene:

"Q. Did you ask the engineer what happened?
A. Yes.

Q. Did he make a statement to you as to what occurred?

* * * * *

A. He stated that he whistled at the whistle post, which is approximately 1350 feet west of the intersection, and that he applied full emergency brake while he was about three car lengths east of that whistle post, which would be approximately 1200 feet west of the crossing. The train stopped about a half a mile east of the crossing."

Plaintiffs also presented an expert witness who testified that by his measurements the lead engine stopped 2,632 feet east of and past the intersection, and assuming a 60 m.p.h. speed, he calculated that the brakes had been applied 954 feet west of the crossing.

The evidence disclosed that the train crew on the fatal sunny afternoon had a straight and clear view of the crossing from as far away as 5,000 feet.

The crossing is located in Livonia, Michigan, a suburb adjacent to and northwest of Detroit. In 1960 its population was 66,700, an increase of 49,200 over the 1950 census figure.

The area surrounding the crossing houses a number of industrial and commercial sites, as well as a large residential area one-half mile from the crossing.

A traffic count taken shortly after the accident showed that 27,493 vehicles a day passed over this highway at a point located one-half mile south of this crossing.

In the general area of the crossing are found a grocery warehouse and store, an automotive laboratory, a building supply store, and a feed store. A large racetrack and parking area therefor is nearby, as is an automobile production plant and a large shopping center. Traffic from these sites is serviced by the four-lane highway in question. The crossing itself was described by the police officer witness as "pretty much open." On the afternoon of the

accident the racetrack was in operation, and witnesses described traffic as "fairly crowded"—"fairly heavy."

Under state regulation the railroad had been required six years before this accident to install automatic short-arm gates and flasher signals at this crossing, in addition to the regular cross-buck railroad crossing signs.

In this case it is undisputed that all the warning and protective devices required by law and specified by the Public Service Commission were operating properly on the date of the fatal accident. This included the air horn on the diesel engine, which all of the witnesses testified to hearing blow.

On these facts the trial judge denied a motion for directed verdicts, holding that there were issues of fact which established jury questions both as to defendant's negligence and the driver's contributory negligence.

He charged the jury to consider the plaintiffs' negligence claims under only two issues:

> "The only grounds now relied on by plaintiffs to establish negligence on the part of the defendant, as I have already mentioned, are, first, that the defendant railroad operated its train at an excessive speed and, second, that the engine crew for whose acts the defendant is responsible failed to keep a proper and adequate lookout for traffic on Middle Belt Road.
>
> "The plaintiffs do not now claim any failure on the part of the defendant railroad in maintaining or operating adequate and required traffic protection devices at the crossing, including the timing of such devices, and, therefore, I instruct you to disregard any testimony with respect thereto.
>
> "There was no statute or city ordinance placing a speed limit on the train involved in this collision on June 16, 1961, but, nevertheless, under the law, the train must be run at a reasonable speed and with that degree of care and prudence required for the safety

of the lives and property of those engaged in the operation of the train by the railroad and also of those persons likely approaching and traveling over the crossing.

"What is a reasonable speed depends on the nature of the crossing and other circumstances of the case. The rate of speed that would be entirely safe under some conditions may, however, be improper under other conditions, and it is for you as judges of the facts to determine whether or not the speed which the train was operated at this crossing was negligent under all the circumstances in this case, such as the nature of this crossing on the day and at the time of this collision, including the length of warning time provided to motorists by the timing pattern or gates and flashers.

"There is a duty on the part of the train crew to keep a proper lookout in the case of an approach to a public crossing. The lookout must be one as is reasonable and proper under all the circumstances involved at the time and place involved, including the speed of the train and such conditions as may then exist at the crossing."

He also charged as to the nature of contributory negligence and its applicability in the driver's case, and its inapplicability under Michigan law to the cases of the minor children passengers.

He also charged that there was no state statute or ordinance of the City of Livonia which imposed a legal speed limit upon defendant's trains at the crossing in question.

As we have noted, the jury returned a verdict for the defendant railroad as to the first case brought by the administratrix of the estate of the deceased driver-mother. It also returned verdicts totaling $56,000 in the children's cases—most of this sum being awarded for the benefit of the seriously injured surviving child.

Subsequently, plaintiffs moved for a new trial in the mother's case, and the defendant moved for judgments non obstante veredicto in the children's cases. As we have noted, the District Judge denied plaintiffs' motion for new trial and granted defendant's motions for judgments non obstante veredicto.

On appeal plaintiffs complain about various provisions in the Judge's charge to the jury, including his recital of the Michigan state statute[1] requiring automobile drivers to stop when a warning signals the approach of a train, and his mention of the fact that there was neither a state nor city speed limit applicable to the crossing in question.

[1] We find no error in these portions of the charge and no prejudicial error in the charge as a whole. Taken as a whole, we believe that it was a statement of the applicable law of the state of Michigan which was fair to both parties.

[2] The jury could have concluded from the facts before it that this unfortunate mother—and brand new driver—became panic-stricken as a result of proximity to the railroad crossing when the bells and flashers were actuated; and failing to stop before the crossing, actually did stop and stall her car squarely upon the defendant's tracks and in the path of the approaching train. We have no doubt that such facts and inferences could properly have convinced the jury that her contributory negligence barred this claim.

The problems posed by the other appeals require somewhat more discussion. Four months after trial the District Judge set the verdicts in the children's cases aside in a careful and lengthy opinion[2] in which he held that his reexamination of the record and the law indicated no negligence on defendant railroad's part as a matter of law. His opinion recites respectable precedent for his ruling both from Michigan case law and that of other jurisdictions. But our ultimate conclusion is that the weight of authority requires sustaining all of the jury verdicts.

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[1] Mich. Comp. Laws of 1948, §257.667, Mich. Stats. Anno. §9.2367.

[2] Ludwig v. Chesapeake & Ohio Railway Co. (Serratoni v. Chesapeake & Ohio Railway Co.), 229 F. Supp. 61 (E. D. Mich. 1962).

[3, 4] Since the accident happened in Michigan, our primary concern is with Michigan law. Under Michigan law the contributory negligence of the mother-driver cannot be imputed to the children passengers. Bricker v. Green, 313 Mich. 218, 21 N.W.2d 105, 163 A.L.R. 697 (1946).

[5] Further, Michigan law does not favor directed verdicts or judgments entered by the trial judge notwithstanding the verdict of a jury. Justice Cooley enunciated this principle in Detroit & Milwaukee Railroad Co. v. Van Steinburg, 17 Mich. 99, 120: "The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility." This view has been reiterated and followed many times: Carver v. Detroit & Saline Plank Road Co., 61 Mich. 584, 28 N.W. 721 (1886); Stowell v. Standard Oil Co., 139 Mich. 18, 102 N.W. 227 (1905); Burghardt v. Detroit United Railway, 206 Mich. 545, 173 N.W. 360, 5 A.L.R. 1333 (1919), and reemphasized in recent years; Kaminski v. Grand Trunk Western Railroad Co., 347 Mich. 417, 79 N.W.2d 899 (1956); Ware v. Nelson, 351 Mich. 390, 88 N.W.2d 524 (1958); Patterson v. Pennsylvania Railroad Co., 238 F.2d 645 (C.A.6, 1956).

In this last case reversing a directed verdict in a Michigan grade crossing accident, Judge Martin quoted Justice Cooley further, and added a comment:

> "[T]he great legal authority said: 'When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair minded men may well differ.'
>
> "Some of us have noted a modern tendency--perhaps a growing one— to give mere lip service to these sound principles. Trial by jury is our established constitutional safeguard against assumption of unwarranted

judicial authority and should be honored by steadfast observance * * *." Patterson v. Pennsylvania Railroad Co., supra, 238 F.2d at 650.

[6] Finally, in terms of general legal principle. Michigan law requires us, when reviewing the grant of judgment for defendant notwithstanding a jury verdict for the plaintiff, to view the conflicting facts and inferences from the point of view favorable to plaintiff—this being the point of view which was accepted by the jury. Ware v. Nelson, supra; Cabana v. City of Hart, 327 Mich. 287, 42 N.W.2d 97, 19 A.L.R.2d 1333 (1950).

[7] The trial judge submitted this case to the jury on issues of defendant's speed and lookout. As to the first of these issues it should be noted that Michigan is a leading authority in relation to the rule that whether or not the speed of a train was negligent, in view of all the surrounding facts and circumstances, is generally a question for the jury. Holdings to this effect may be found stretching from 1885 down to 1957. They include Klagowski v. Grand Trunk Railway Co., 57 Mich. 525, 24 N.W. 801 (1885); Block v. Ann Arbor Railroad Co., 202 Mich. 341, 168 N.W. 526 (1918); Hudson v. Grand Trunk Western Railway Co., 227 Mich. 1, 198 N.W. 339 (1924); Morgan v. Detroit, Jackson & Chicago Railway Co., 234 Mich. 497, 208 N.W. 434 (1926); and Davis v. New York Central Railroad Co., 348 Mich. 262, 83 N.W.2d 271 (1957).

In fact, the general rules on this topic, as set forth in several recognized law encyclopedias, cite Michigan case law first in support thereof. Thus, American Jurisprudence relies on the Morgan and Hudson cases, supra, for this proposition:

> "It is generally held that it is for the jury to determine whether or not the speed at which a train was operated was negligent under all the circumstances." 44 Am. Jur. Railroads §456, at 686.

And the American Law Reports Annotated, in an annotation entitled "Negligence—Speed of Train at Crossing" cites the general rule thus:

> "The general rule is that the question whether speed constitutes negligence depends upon all the circumstances of the particular case, and that whether the circumstances of the case establish a negligent rate of speed is a question for the jury." 154 A.L.R. 212, 258, citing: Klanowski v. Grand Trunk Railway Co., supra; Ommen v. Grand Trunk Western Railway Co., 204 Mich. 392, 169 N.W. 914 (1918); Fillingham v. Detroit, Grand Haven & Milwaukee Railway Co., 207 Mich. 644, 175 N.W. 227 (1919); (followed in Stahl v. Michigan Central Railroad Co., 227 Mich. 469, 198 N.W. 881 (1924)); Morgan v. Detroit, Jackson & Chicago Railway Co., supra.

[8] There is, however, a recognized exception to this rule which appears to hold that as a matter of law high speed operation of a train over a rural crossing is not negligence, absent some unusual circumstances. The leading Michigan cases in exemplifying this exception are Buchthal v. New York Central Railroad Co., 334 Mich. 556, 55 N.W.2d 92 (1952); Elias v. Collins, 237 Mich. 175, 211 N.W. 88, 52 A.L.R. 1118 (1926); Shufelt v. Flint & Pere Marquette Railroad Co., 96 Mich. 327, 55 N.W. 1013 (1893), and Robinson v. Flint & Pere Marquette Railroad Co., 79 Mich. 323, 44 N.W. 779 (1890) which the District Judge quoted and relied upon in setting aside these verdicts.

[9] On this record, however, we cannot agree that Buchthal (or like cases) is applicable law. On the view of the facts favorable to plaintiffs, we deal with a train speed of 60 to 70 m.p.h. approaching a crossing over a busy highway in a populous city in a major metropolitan area with traffic problems complicated by near-by plant and racetrack operations. This can hardly be regarded as a rural crossing case. As to the nature of the crossing, we believe there was ample evidence to support the submission of the speed issue to the jury.

A separate issue is posed, however, by those cases relied upon by the District Judge which are cited for the holding that where a railroad has complied with all statutory requirements for warning, then speed of the train is not negligence as a matter of law. Markar v. New York, N. H. & H. R. Co., 77 F.2d 282 (C.A.2, 1935); Engberg v. Great Northern Railway Co., 207 Minn. 194, 290 N.W. 579, 154 A.L.R. 206 (1940); Conner v. Pennsylvania Railroad Co., 163 F. Supp. 718 (E.D.Pa.1958), aff'd 263 F.2d 944 (C.A. 3, 1959). None of these are Michigan cases. No one of the three cases involved an automobile stalled on the tracks. And in sum total, the three hardly do more than illustrate the facts that on different facts, courts tend to reach different conclusions.

The Engberg case (from Minnesota) parallels the Michigan rural crossing rule which we have just discussed and held not applicable. The Markar case does say that under the facts of that case the speed of the train should not have been submitted to the jury as a negligence question. But the third citation, the Conner case, was a case wherein the Third Circuit affirmed a jury award (for the defendant) specifically approving the trial court instruction which submitted both speed and warning as issues for jury consideration. Conner v. Pennsylvania Railroad Co., supra.

Still dealing with the law of other states, we find many stalled automobile cases holding that the speed of the train is generally a factor for jury consideration under all the circumstances of the case. Herrera v. Southern Pacific Co., 155 Cal.App.2d 781, 318 P.2d 784 (1957); Florida East Coast Railway Co. v. Schweida, 151 So.2d 665 (Fla.App. 1963); Atlantic Coast Line Railroad Co. v. Parker, 90 Ga. App. 251, 82 S.E.2d 706 (1954); Campbell v. Patton, 227 Md. 125, 175 A.2d 761 (1961); Chicago, Rock Island and Pacific Railroad Co. v. Hugh Breeding, Inc., 232 F.2d 584, 247 F.2d 217 (C.A.10,1957), cert. denied, 355 U.S. 880, 78 S.Ct. 138, 2 L.Ed.2d 107; McVicker v. Chesapeake & Ohio Railway Co., 307 F.2d 501 (C.A.6, 1962).

In the last case Chief Judge Miller dealt with an accident where a truck stalled on an Indiana railroad crossing in a snow storm. Holding that defendant's compliance with all statutory requirements did not remove speed as a negligence issue from the case,[3] he quoted a United States Supreme Court view:

> "As was said by the Supreme Court in the Grand Trunk Railway Co. case (144 U.S. at p. 417, 12 S.Ct. at p. 682), [Grand Trunk Railway Co. of Canada v. Ives, 144 U.S. 408, 12 S.Ct. 679, 36 L.Ed. 485 (1892)] 'There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. * * * When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court.'" McVicker v. Chesapeake & Ohio Railway Co., supra, 307 F.2d at 504.

The Ives case was concerned with a Michigan grade crossing accident where it was claimed that compliance with all statutorily stipulated duties rendered the railroad free from negligence as a matter of law. This view was rejected by the United States Supreme Court, relying on two old Michigan Supreme Court cases—Freeman v. Duluth S. S. & A. Railway Co., 74 Mich. 86, 41 N.W. 872, 3 L.R.A. 594 (1889) and Guggenheim v. Lake Shore & Michigan Southern Railway Co., 66 Mich. 150, 33 N.W. 161 (1887).

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[3] On another ground the case found Plaintiff's recovery was barred by his contributory negligence.

Very recently (subsequent to decision by the trial court!) this same rule and these same cases have been reviewed by the Michigan Supreme Court. The court held unanimously on the point in question:

> "Decision in this appeal has required our consideration of the circumstances in which a jury must be allowed to determine performance or breach of a railroad's common law duty of care at grade crossings. The trial judge initially submitted this issue to the jury which found from the evidence that due care required more from the defendant railroad than its mere maintenance of warning devices required by statute; but the judge subsequently concluded in granting defendant judgment *non obstante* that *as a matter of law*, the circumstances disclosed by the evidence did not require of defendant any greater care than mere compliance with statutory requirements. For reasons to be subsequently stated, it is our conclusion that the trial judge was correct initially in submitting the question of defendant's compliance with its common law duty of care for factual determination by the jury and that the jury's finding that defendant had breached such duty was amply supported by the evidence." Emery v. Chesapeake & Ohio Railway Co., 372 Mich. 663, 127 N.W.2d 826 (1964).

We conclude that under Michigan law the trial judge committed no error in submitting the issue of train speed to the jury.

Generally, of course, in these stalled automobile cases the speed of the train is considered in relation to the observation and braking of the train crew. This was the second issue which the trial judge submitted to the jury in the instant case.

On this point the facts in our present case, taken on favorable view to plaintiffs, would establish that the train as it passed the crossing gate actuation switch 3,000 feet from the crossing was traveling at a speed of 900 to 1,000 feet every ten seconds; that the automobile in which these

children were seated was stalled on the tracks for more than two-thirds of that time interval; and that the train traveled over half of the remaining distance of over 2,000 feet with the endangered vehicle in full view before emergency application of the brakes.

Defendant's brief deals with this aspect of the problem thus:

> "Plaintiffs claim that Defendant's engineer should have seen the car and applied the brakes when the train was Two Thousand Three Hundred and Eighty feet (2,380') west of the crossing. This was the theory of the facts which Plaintiffs must adhere to on this appeal. * * * It is undisputed that had the brakes of the train been applied at this point the train would have struck the automobile at a speed of forty (40) miles per hour. If the brakes on the train were applied One Thousand Two Hundred feet (1,200') west of the crossing as stated by the railroad engineer, the automobile would have been struck while the train was traveling at a speed of fifty-five (55) miles per hour."

[10, 11] Any braking, of course, increased the crucial time interval available to the frantic efforts of the driver to escape. We take judicial notice of the fact that a modern automobile can be started and moved its own length in very few seconds. We also note that any movement of the automobile and any decrease of speed or force of the train—even if insufficient to have prevented impact—could have changed substantially both the nature of the accident and the nature of the injuries suffered therefrom.

By so saying we are not presuming that additional time or lessened force would necessarily have prevented this accident or necessarily have prevented the deaths or injuries here complained of. But by so saying we do reject the invitation to join in holding as a matter of law that such favorable results of prompt braking were beyond

the contemplation of reasonable men under all the facts in the plaintiffs' case.

The three Michigan cases which seem to us closest in point to the instant fact situation pertaining to train crew observation and braking are: Aetna Insurance Co. v. Detroit & Toledo Shore Line Railroad Co., 354 Mich. 580, 93 N.W. 2d 272 (1958); Sutter v. Pere Marquette Railway Co., 230 Mich. 489, 202 N.W. 967 (1925); and Orlowski v. Pere Marquette Railway Co., 222 Mich. 580, 193 N.W. 201 (1923).

None of these are "brown cow" cases. For one thing each was brought by a driver whose conduct (contrary to those cases we currently consider) was subject to attack as causally related to his own predicament. Speed and statutory regulations differed. But in each an automobile was stalled on railroad tracks in front of an onrushing train for an appreciable interval of seconds; in each plaintiff claimed negligence in lookout and braking; in each a verdict for plaintiff was sustained. And we have had cited to us and have been able to find no instance of a stalled automobile-railroad crossing case in Michigan where the negligence claims of a plaintiff were barred from jury consideration as a matter of law, except on grounds of his own contributory negligence.

As we have noted, the children's cases we deal with in appeal No. 15,451 are not subject to this last objection.

The judgment in appeal case No. 15,450 is affirmed.

The judgments in appeal case No. 15,451 are vacated and the case is remanded for entry of judgments in accordance with the jury verdicts.

APPENDIX "C"

ORDER OF COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC

No. 15,450
15,451

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERESA SERRATONI, as Administratix of the Estate of Lois Jane Zatek, Deceased, EUGENE LUDWIG, as Guardian of the Estate of Richard Paul Zatek, a minor, et al.,
Plaintiff and Appellants,
v.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a foreign corporation,
Defendant and Appellee.

Before WEICK, Chief Judge; MILLER, CECIL, O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

The petition for rehearing en banc is hereby denied.

Approved for entry

/s/ George Edwards,
United States Circuit Judge.

APPENDIX "D"

28 U.S.C.A. §1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * * *

APPENDIX "E"

U.S.C.A. CONST. AMEND. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "F"

U.S.C.A. CONST. AMEND. 14, §1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "G"

U.S.C.A. CONST. AMEND. 7

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX "H"

28 U.S.C.A. §1652

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

APPENDIX "I"

THE COMPILED LAWS OF THE STATE OF MICHIGAN, 1948, §462.44

Act 300, Michigan Public Acts of 1909

AN ACT to define and regulate common carriers and the receiving, transportation and delivery of persons and property, prevent the imposition of unreasonable rates, prevent unjust discrimination, insure adequate service, create the Michigan railroad commission, define the powers and duties thereof, and to prescribe penalties for violations hereof.

* * * * *

Sec. 44. The police powers of the state over railroads, street railways, interurban railways and suburban street railways, whether operated by steam, electricity or other motive power, organized or doing business in this state, shall be and the same are hereby vested in the railroad commission, and it is hereby made the duty of said railroad commission to exercise the same in accordance with the requirements of the law.